

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8 VOLUME 3

9 Transcript of Motions to Suppress Proceedings
10 and James Hearing before The Honorable James O.
11 Browning, United States District Judge, Las Cruces,
Dona County, New Mexico, commencing on December 20,
2017.

12 For the Government: Ms. Maria Armijo; Mr. Randy
13 Castellano; Mr. Matthew Beck

14 For the Defendants: Mr. Brock Benjamin; Ms. Cori
15 Harbour-Valdez; Mr. Robert Cooper; Mr. Jeff Lahann;
16 Mr. Orlando Mondragon; Mr. Billy Blackburn; Mr. Scott
Davidson; Ms. Amy Jacks; Mr. Richard Jewkes; Ms. Amy
17 Sirignano; Mr. Christopher Adams; Mr. Marc Lowry; Ms.
Theresa Duncan; Ms. Carey Bhalla; Mr. William
Maynard; Ms. Justine Fox-Young; Ms. Lisa Torracco; Ms.
Angela Arellanes; Mr. Jerry Walz

18
19 For the Defendants (Via telephone): Mr. James Castle
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1 THE COURT: All right. Let's settle down.
2 Let's go on the record. It looks like everybody has
3 got an attorney this morning. Mr. Maynard, I
4 understand you're leaving after lunch, and Ms. Bhalla
5 will be here the rest of the day; is that correct?

6 MR. MAYNARD: Yes, Your Honor.

7 THE COURT: All right. And we've got
8 Mr. Mondragon for Mr. Gallegos. Mr. Lahann, I
9 understand you're going to be working with Judge
10 Brack to get a sentencing done, so when we take a
11 break you're going to run up there and so we'll work
12 with you to try to get that done.

13 MR. LAHANN: Thank you, Your Honor.

14 THE COURT: Anything else that we need to
15 put on the record? Mr. Jewkes?

16 MR. JEWKES: Your Honor, I need to duck out
17 about 20, 30 minutes to go upstairs to Judge
18 Gonzales, and I'll be back.

19 THE COURT: Ms. Jacks is going to be here
20 all day.

21 MS. JACKS: Until 4:00.

22 MR. ADAMS: Your Honor, I have a flight
23 that I couldn't change. I'll be leaving early. I'll
24 be on the phone on the way down. Thank you.

25 THE COURT: Thank you, Mr. Adams.

1 Anyone else? All right. I have been told
2 by Ms. Standridge that the Government wants to take
3 up Document 1586 first, before we put on the FBI
4 agent in connection with Eric Duran, that Eric Duran
5 suppression motion. So, Mr. Castellano, if you wish
6 to speak on 1586.

7 MR. CASTELLANO: Yes, sir. Thank you, Your
8 Honor.

9 THE COURT: Mr. Castellano.

10 MR. CASTELLANO: The reason I wanted to
11 address this this morning is I'm going to ask the
12 Court to strike this pleading from the record, or at
13 least portions of the pleading. Ironically, this was
14 filed in response to the Government's motion in
15 limine to keep people from asking personal questions
16 about witnesses, so as not to harass or intimidate
17 them. But the pleading itself starts out by doing
18 that.

19 It's clear -- the pleading lists a few
20 cases in which Agent Acee was named as a defendant in
21 a number of -- a couple of civil cases. It's
22 completely nonresponsive to the motion filed by the
23 U.S. Attorney's Office. And it really serves no
24 purpose other than to intimidate, harass, or
25 embarrass the Government's case agent. There is

1 really no other explanation.

2 THE COURT: Does it put him or any of his
3 work or the United States' work in any danger,
4 jeopardy, anything like that? Or is it just
5 annoying?

6 MR. CASTELLANO: One, it's annoying, but
7 the other part is that, of course, we're on the eve
8 of trial. We now have a pleading on the docket which
9 throws mud on the Government's case agent. So if the
10 press picks it up, obviously it has the tendency to
11 generate press, and hurt the jury pool and influence
12 the jury pool, when we're a month out from trial. So
13 if the press picks it up, what they see is a story
14 about the case agent, and defense throwing mud at
15 him. So the concern there is that it's going to
16 unduly sway the jury, and sway them against the
17 United States, when they see a news report involving
18 the Government's case agent.

19 So it has two purposes. Like I said, it's
20 there to embarrass, harass, or annoy, and it also
21 serves to taint the jury pool, if it's picked up. So
22 I would ask the Court to strike the pleading from the
23 record, or at least strike those portions related to
24 Agent Acee. As I stated, there is nothing about
25 those statements that is responsive to the

1 Government's motion, and it doesn't address that in
2 any way. And that takes up half the pleading.

3 THE COURT: All right. Thank you, Mr.
4 Castellano.

5 MR. CASTELLANO: Thank you, Your Honor.

6 THE COURT: All right. Mr. Benjamin?

7 MR. BENJAMIN: Your Honor, I think that
8 pleading is extremely responsive. It does the
9 opposite of what the Government put in their motion
10 in limine for the personal information.

11 And this entire process over the last two
12 years has been them attempting to paint their picture
13 of the story. This paints exactly what I think the
14 issues need to be. This is not a one-sided issue
15 where they get to say what they want, how they want,
16 and then say that we can't go into personal
17 information of other people. As I stated at the end
18 of the motion, Your Honor, and as we discussed
19 yesterday when discussing this motion, there is, I
20 don't think, anything that comes up that's relevant.
21 Nothing in that motion is personal. Those are all
22 facts that were taken from plaintiffs' petitions
23 against Special Agent Acee in his official
24 capacities. And so those were public documents, as a
25 matter of public record.

1 And the body of the Government's motion in
2 limine starts out by saying that they want to make
3 sure that, because of the threats that have been
4 taken, because of the actions that have been taken by
5 defendants, they want to protect personal
6 information. My response to that was exactly that
7 they need to look at their own table, if they want to
8 look for threats and actions that have been taken,
9 and other people disagree with. So I think it's
10 extremely responsive, Your Honor.

11 THE COURT: Well, I guess I have some
12 questions whether it's responsive. It just seems to
13 me that there was -- this was tied to the motion not
14 to bring out at trial personal information about the
15 Government's witnesses; correct? I mean, the title
16 is not even, I think, in compliance with our rules.
17 But the title has to respond to the pleading. I
18 mean, this is just a Defendants' Suggestion that the
19 Government is More Violent Than Defendants. That's
20 pretty raunchy, don't you think?

21 MR. BENJAMIN: I guess "raunchy" wasn't the
22 term that came to mind, Your Honor. I apologize to
23 the Court.

24 THE COURT: What is the point of this in
25 response to the Government's motion?

1 MR. BENJAMIN: Your Honor, the body of --

2 THE COURT: Tell me, though, how it would
3 inform the Court that it should deny the Government's
4 motion for you to put this material in here?

5 MR. BENJAMIN: Because I think of what it
6 specifically contains in the body of the motion, Your
7 Honor.

8 THE COURT: Well, let me ask my first
9 question.

10 MR. BENJAMIN: Yes, Your Honor.

11 THE COURT: This responds to the
12 Government's motion that the defendants not get into
13 personal information at trial. Is that what this is
14 a response to?

15 MR. BENJAMIN: That is exactly a response
16 to that, Your Honor, yes.

17 THE COURT: Tell me how this Canadian case,
18 how that impacts what I'm supposed to glean from that
19 in regard to that motion.

20 MR. BENJAMIN: I apologize, when the Court
21 says "Canadian case" -- if I can pull it up, Your
22 Honor. The Government started on that --

23 THE COURT: You keep talking about Mr. Acee
24 being a -- something with the Canadian police?

25 MR. BENJAMIN: He was in Vancouver,

1 Washington, Your Honor.

2 THE COURT: Okay. Tell me how that
3 responds to the motion.

4 MR. BENJAMIN: Your Honor, there was
5 allegations in that case that Special Agent Acee
6 authored an affidavit and went --

7 THE COURT: Tell me how that responds to
8 the Government's request that the defendants not get
9 into personal information while the witnesses are on
10 the stand at trial.

11 MR. BENJAMIN: In the original motion,
12 Document 1520, they quoted actions that they said the
13 defendants took -- and I'm trying to pull that up,
14 Your Honor -- and cited, essentially, as I believe
15 just allegations. And so I was responding directly
16 to those allegations that were put in the body of the
17 motion, 1520.

18 THE COURT: How does this respond?

19 MR. BENJAMIN: Your Honor, may I have a
20 second to pull it up?

21 THE COURT: I'm at a loss. Tell me how
22 that responds to what we're going to do at trial.

23 MR. BENJAMIN: If I may have a second, Your
24 Honor. The issue that was in the motion was whether
25 or not personal information should be brought out by

1 the defendants at trial. That was the point of the
2 motion, as I understood it.

3 The Government in its body of the motion,
4 in the background portion, talks about the SNM
5 investigation has uncovered a large number of
6 potential threats to witnesses. I think this is the
7 Government trying to inflate those threats in -- much
8 as Mr. Castellano said, and much as they have done in
9 their actions in the past --

10 THE COURT: Why didn't you make that
11 argument, rather than talking about what you talk
12 about here?

13 MR. BENJAMIN: Your Honor, the thought in
14 my mind when I was drafting that, for lack of a
15 better term, pictures are worth 1,000 words, and
16 that's what I was trying to do.

17 THE COURT: I guess I'm missing the picture
18 and the words. Where does it say in the brief what
19 you just said to me, that you pointed out, that they
20 were inflating certain statements in their brief?

21 MR. BENJAMIN: I can't point to that, Your
22 Honor. I was trying to do that by -- the word's
23 escaping me, but I was trying to draw that out by the
24 way that I responded with that brief. Because that
25 has been -- from where I am sitting, representing Mr.

1 Gallegos, they have been doing exactly what I did in
2 my response in my objection, Your Honor. And that is
3 trying to elicit this big picture. And so I was
4 responding with a picture of my own. And I believe
5 that responded directly. And in the end of the
6 motion, I believe is where, as I stated that the
7 response, I think, was odd, because I don't know how
8 to -- I don't plan on getting into their personal
9 information. And I don't believe getting into the
10 information that I elicited regarding Special Agent
11 Acee gets into any personal information. That's
12 public information.

13 THE COURT: So why get into it in this
14 response?

15 MR. BENJAMIN: Your Honor, for the very
16 reason, as I said, their motion brought out the SNM
17 investigation has uncovered large potential threats.
18 I believe that's how the plaintiffs in those
19 petitions felt. And that's what I was trying to
20 elicit, and obviously doing a poor job. But that's
21 what I was trying to elicit, was the idea that the
22 Government has put forth this idea that there is a
23 whole bunch of bad actors out there. And I don't
24 think that they're allowed to freely slander or make
25 allegations. Yes, they have. They brought everybody

1 into court, but --

2 THE COURT: Was that your point that,
3 because you thought the Government had slandered your
4 defendants, you were going to slander back the
5 Government's witness?

6 MR. BENJAMIN: Your Honor, I don't
7 believe --

8 THE COURT: Is that what you did? It was
9 just a quid pro quo?

10 MR. BENJAMIN: Your Honor, no, what I did
11 is I drew out specific allegations out of specific
12 pleadings that I have uncovered out of discovery that
13 I believe are items that I believe illustrate --

14 THE COURT: It doesn't sound like it was
15 responsive to the motion. It just sounded like since
16 they slandered, you're going to slander. Is that
17 your point?

18 MR. BENJAMIN: No, Your Honor. My point --
19 and I apologize if I'm not covering it very well.

20 THE COURT: No, you're not covering it very
21 well, Mr. Benjamin.

22 MR. BENJAMIN: But there is a portion of
23 their motion that says because of that fact,
24 everybody is going to know they're going to hit my
25 family, I'm never going to tell them -- they're

1 talking about specific actions. So that's where I
2 went with specific actions, Your Honor.

3 THE COURT: Specific actions of Mr. Acee?

4 MR. BENJAMIN: Yes, Your Honor.

5 THE COURT: And why?

6 MR. BENJAMIN: Because of what was
7 contained in the body of 1520 that I just read, Your
8 Honor.

9 THE COURT: They slander your client;
10 you're going to slander theirs?

11 MR. BENJAMIN: Your Honor, when the Court
12 says it that way, I can understand the Court's
13 concern.

14 THE COURT: That was your word.

15 MR. BENJAMIN: It was my word, Your Honor.
16 But my word was -- I guess what I wanted to do, and I
17 don't believe I've done a very effective job, but I
18 think I've done an accurate job, is bring this issue
19 to the Court's attention.

20 THE COURT: What is the issue? What are we
21 going to do with this, now that you've filed this
22 public document and brought it to the Court's
23 attention, what are we going to do with it?

24 MR. BENJAMIN: Your Honor, yesterday we
25 resolved this by saying that we weren't going to get

1 into the personal information. And as I stated, I
2 don't believe there is any personal information that
3 I put in that motion -- in my response.

4 THE COURT: Yeah, that's the reason I'm
5 trying to figure out why you put it in the brief
6 then.

7 MR. BENJAMIN: Because, Your Honor, it
8 deals with specific facts, much like the Government
9 in 1520 put in what they believe are specific facts
10 or threats.

11 THE COURT: All right. Anything else, Mr.
12 Benjamin?

13 MR. BENJAMIN: I think there is a lot I'd
14 like to add, Your Honor, but I don't believe I'm
15 doing it effectively. So, no, at this point in time,
16 I don't think so.

17 THE COURT: Well, I'll listen, if you want
18 to speak.

19 MR. BENJAMIN: Your Honor, I guess my
20 position is, when I drafted that on the weekend --
21 actually, when I drafted it, I believe, on Thursday,
22 then we got an extension on Friday, Your Honor, in
23 drafting that, I believed that that was a fair and
24 accurate response to the Government's Document 1520.
25 And, essentially, on page 2, where they get into the

1 actual types of threats and different issues. And I
2 believe they've been able to make those allegations.

3 And, Your Honor, I guess what I would like
4 to relay to this Court is that I didn't believe that
5 was a one-sided issue. That is an issue that I think
6 needs to go both ways. And that's why I am -- I have
7 responded that I don't believe personal information
8 is necessary or required, because of both sides. And
9 so, Your Honor, I think this pleading is an accurate
10 portrayal of my response to 1520.

11 THE COURT: The Government has made a
12 motion to strike the document. How do you feel about
13 that?

14 MR. BENJAMIN: Your Honor, that I guess --
15 I think that is -- the only word that comes to mind
16 is unfair and inaccurate, Your Honor. The
17 Government -- and I specifically have not mentioned
18 anything to the press. The only individuals that
19 have brought any, or released any issues to the press
20 in this matter have been the Government. I
21 understand --

22 THE COURT: How about that article that
23 appeared on the front page of the Journal last week?
24 Was that generated by the defense?

25 MR. BENJAMIN: I don't know what article

1 you're talking to, Your Honor.

2 THE COURT: The front page of the
3 Albuquerque Journal.

4 MR. BENJAMIN: I apologize --

5 THE COURT: Certainly, reading that
6 article, it looked like the defense probably had
7 their hand on that.

8 MR. BENJAMIN: I will have to go Google
9 that, Your Honor. I'm from the southern half -- I'm
10 from El Paso, as the Court, I believe, knows -- from
11 the southern half of the state. I don't read the
12 Journal.

13 THE COURT: You might get on the internet
14 and look at that, and give me your impression as to
15 whether that was something that the Government put
16 out or defense lawyers put out.

17 MR. BENJAMIN: And, Your Honor, and I
18 apologize, what I was continuing saying is that the
19 Government, I understand, at this point in time, has
20 agreed, based upon some emails I've seen that nobody
21 is putting out any press releases. I can speak for
22 myself, Your Honor. I know I haven't. But I will
23 take a look at the article from last week in the
24 Journal.

25 But I do not believe that there is any

1 grounds to strike the motion. As the Court can tell
2 from the brief, I guess I was maybe not in the best
3 drafting mode when I did that. But I think it's a
4 very accurate and correct response to Document 1520,
5 Your Honor.

6 THE COURT: All right. Anything else, Mr.
7 Benjamin?

8 MR. BENJAMIN: No, Your Honor.

9 THE COURT: Thank you, Mr. Benjamin.

10 Ms. Harbour-Valdez, why don't you come up
11 to the podium. Tell me why the response to the
12 motion in limine that the Government filed included
13 this information.

14 MS. HARBOUR-VALDEZ: Which information?

15 THE COURT: Did you read the brief before
16 it was filed?

17 MS. HARBOUR-VALDEZ: Mr. Benjamin's?

18 THE COURT: That has your signature on it.

19 MS. HARBOUR-VALDEZ: Was it filed on behalf
20 of everyone?

21 THE COURT: Yes, your signature is on page
22 4.

23 MR. BENJAMIN: Yes.

24 MS. HARBOUR-VALDEZ: Okay. My
25 understanding, Your Honor, is that Mr. Benjamin was

1 trying to --

2 THE COURT: My question was: Did you read
3 it before your signature went on this document?

4 MS. HARBOUR-VALDEZ: I did not read it,
5 Your Honor, no. What we had agreed among the
6 defense, is that when a response was being filed to
7 the motions in limine that we had all joined, that
8 was the informal agreement among the defense.

9 THE COURT: So did you know this document
10 was going to respond in the way that it did?

11 MS. HARBOUR-VALDEZ: I did not read it,
12 Your Honor. So, no.

13 THE COURT: All right. Anything you want
14 to say on the motion to strike by the Government?

15 MS. HARBOUR-VALDEZ: No, Your Honor.

16 THE COURT: Do you oppose it?

17 MS. HARBOUR-VALDEZ: I take no position. I
18 think it's an extreme request. I understand, though,
19 why they're doing it. I also understand why Mr.
20 Benjamin has drafted this the way that he did. I
21 think he was trying to portray a different picture of
22 what goes on in this case, Your Honor.

23 THE COURT: All right. Anything else,
24 Ms. Harbour-Valdez?

25 MS. HARBOUR-VALDEZ: Nothing else, Your

1 Honor.

2 THE COURT: All right. Mr. Cooper, why
3 don't you come up to the podium. Did you look at
4 this motion -- it has your signature on it. Did you
5 look at this response before it was filed?

6 MR. COOPER: No, Your Honor, I did not.

7 THE COURT: Do you have any thoughts about
8 the response?

9 MR. COOPER: Your Honor, like
10 Ms. Harbour-Valdez said, the group has agreed that
11 not everybody should respond to every motion. And we
12 all agreed that the responses should be filed on
13 behalf of all defendants. But I did not read it,
14 Your Honor. And I don't have any thoughts. And I
15 still have not read it.

16 THE COURT: All right. And do you have any
17 position on whether the brief should be stricken?

18 MR. COOPER: Your Honor, having not read
19 it, I don't have a position on that.

20 THE COURT: All right.

21 MR. COOPER: Thank you.

22 THE COURT: Thank you, Mr. Cooper.

23 MR. COOPER: Your Honor, while I'm here I'd
24 like to inform the Court that Mr. Castle is on the
25 phone.

1 THE COURT: Oh, okay.

2 MR. COOPER: I don't think that he -- I
3 don't think the Court knew that. But anyway, he's
4 on.

5 THE COURT: All right. I'll do that.
6 Thank you, Mr. Cooper. Let me get the people who are
7 on the phone. Mr. Castle, are you there? Are you
8 present, Mr. Castle? Got your mute button on?

9 MR. CASTLE: Yes, Your Honor.

10 THE COURT: How about you, Mr. Castle, do
11 you have -- did you read this response before it was
12 filed? Mr. Castle?

13 MR. CASTLE: Your Honor, I'm having
14 difficulty. I don't know if the Court can hear me at
15 all.

16 THE COURT: We can hear you now. Did you
17 have an opportunity to read Mr. Benjamin's response,
18 or actually, it was the Defendants' Suggestion That
19 the Government is More Violent Than The Defendants.
20 That document, did you have a chance to read it
21 before it was filed?

22 MR. CASTLE: No, Your Honor. My
23 understanding is it was filed during court yesterday,
24 and I did not have an opportunity to review it.

25 THE COURT: Will your responses to my

1 questions be the same as for as the ones that I asked
2 Mr. Cooper?

3 MR. CASTLE: Yes, Your Honor.

4 THE COURT: All right. Mr. Lahann, do you
5 want to come up to the podium here?

6 MR. LAHANN: And, I'm sorry, Your Honor, I
7 haven't had a chance to say it; it's Lahann.

8 THE COURT: Lahann.

9 MR. LAHANN: Yes, Judge.

10 THE COURT: I'll try to say that. Now I'm
11 in a bad habit, so I'll try to get better at it.

12 Mr. Lahann, did you have a chance to read
13 this document before it was filed?

14 MR. LAHANN: I did not.

15 THE COURT: Do you have any thoughts about
16 it?

17 MR. LAHANN: I have no thoughts, because I
18 did not read the brief before it was filed.

19 THE COURT: And your position on the motion
20 to strike by the Government?

21 MR. LAHANN: I take no position on that.

22 THE COURT: All right. Thank you, Mr.
23 Lahann.

24 MR. LAHANN: Your Honor, may I address the
25 Albuquerque Journal article?

1 THE COURT: You may.

2 MR. LAHANN: To my knowledge -- and I
3 certainly wouldn't expect that anybody on the team
4 would have somehow gone to the press with the
5 information that was presented in that article. I
6 was aware of the article two days ago, when it was
7 being passed from some of our clients, from one to
8 another. They were shocked in the way that they were
9 portrayed in that article. My client was very upset.
10 And so I pulled it up on the internet yesterday. And
11 it bothered me, because I felt like -- and I told my
12 client it felt like this was not a seasoned court
13 reporter writing about what goes on in court. It had
14 the point of view of somebody who seems to get all
15 their information about the criminal justice system
16 from what they see in the movies. Just the way the
17 defendants were described. It just -- it seemed
18 hyperbolic, Your Honor.

19 I can't see that any one of us would have
20 done that. And maybe it's just confirmation bias in
21 the way that we read that article. But it just would
22 seem greatly out of character for the people that
23 I've been working with.

24 THE COURT: All right. And did I ask you
25 your position on this motion, Mr. Lahann?

1 MR. LAHANN: You did. And I take no
2 position.

3 THE COURT: All right. Thank you, Mr.
4 Lahann.

5 Mr. Mondragon.

6 MR. MONDRAGON: Yes.

7 THE COURT: Did you have an opportunity to
8 review this Defendants' Suggestion That The
9 Government is More Violent Than The Defendants before
10 it was filed?

11 MR. MONDRAGON: No, Your Honor. I'm in the
12 same boat as Ms. Harbour-Valdez and Mr. Lahann.

13 THE COURT: Do you have any thoughts about
14 the contents of it?

15 MR. MONDRAGON: No, Your Honor. I take no
16 position on the motion.

17 THE COURT: And the Government's motion to
18 strike, do you have a position on it?

19 MR. MONDRAGON: No, Your Honor.

20 THE COURT: All right. Thank you,
21 Mr. Mondragon.

22 MR. MONDRAGON: Thank you, Your Honor.

23 THE COURT: Is there anybody else on the
24 phone besides Mr. Castle?

25 MS. GLASSER: Yes, Your Honor, Erin

1 Glasser.

2 THE COURT: All right. Ms. Glasser.

3 Mr. Blackburn, come up to the podium. Mr.
4 Blackburn, did you have an opportunity to review this
5 Defendants' Suggestion That the Government is More
6 Violent Than Defendants before it was filed?

7 MR. BLACKBURN: No, Your Honor.

8 THE COURT: Do you have any thoughts about
9 its contents?

10 MR. BLACKBURN: No, Your Honor. I knew it
11 was filed -- I knew it was being filed while we were
12 sitting here in the courtroom, because Mr. Benjamin
13 asked me if there was something wrong with the
14 internet, and if I had any ideas how to file -- to do
15 the e-filing. So I knew it was filed. I did not
16 read it before it was filed. As I think everyone has
17 indicated before me, when all of these motions came
18 in, people were given assignments as to who would do
19 these motions. And we have a sort of a trust issue
20 with everybody in this case, that they're going to
21 respond appropriately, and do what is necessary to
22 respond to that. Because, otherwise, there is no way
23 that all of us can respond to every one of these
24 motions.

25 Mr. Benjamin agreed to take that particular

1 motion, that response. He filed it. I've agreed
2 to -- for my name to go on those particular
3 responses. Did I read it? No. Did I know what it
4 said? No. Have I read it? No. I take no position
5 as to what the Court should do under the
6 circumstances with that particular motion.

7 THE COURT: All right. Thank you, Mr.
8 Blackburn.

9 MR. BLACKBURN: I have -- can I respond to
10 the Albuquerque Journal article?

11 THE COURT: You may.

12 MR. BLACKBURN: The reporter who -- I did
13 not know who the reporter was, because I saw her
14 walking in the hallway for a couple of days --
15 actually, I thought she was the paralegal for the
16 Government -- came up and asked me how it was that a
17 lawyer like me -- no, how it was that my client, who
18 has been in custody, could afford a lawyer like me on
19 this case. And I said that the case was a death
20 penalty case in the beginning. I was appointed to
21 that, and I stayed on the case. That was basically
22 the extent of that. She asked another question about
23 motions. And I said, if she wanted to see what the
24 motion was, that she could go online like everybody
25 else and review the -- because I think it was when

1 Mr. Perez was on the stand. And she had asked me
2 what the motion was about. I said, You can just go
3 online and look at that, because I -- actually, this
4 was a conversation that took place maybe 15 or 20
5 seconds before we walked into court. Obviously, we
6 wanted to get back in to be on time.

7 I was a little shocked when my wife opened
8 up the newspaper on Friday morning, or whenever it
9 was, Friday morning, and said, Oh, my gosh, did you
10 see this article? And she was making more fun of the
11 fact that, out of the all the lawyers in this room,
12 who are great lawyers in this whole state, New Mexico
13 and Colorado and South Carolina, that she picked
14 myself and Ms. Sirignano, for some reason as -- to
15 talk about our reputation. That made for quite a bit
16 of ribbing at some of the Christmas parties that we
17 went to this weekend, that I would be in that
18 particular article. So I know that even though my
19 name was mentioned in there, my conversation with her
20 may have lasted 30 seconds at the most. I did not
21 know who she was. And actually, I think I gave her
22 card to Ms. Harbour-Valdez, because she knew who she
23 was because she covers this area down here. But that
24 was the extent of that conversation. I really
25 haven't read much of that article, other than to see

1 the one little paragraph in there that mentioned my
2 name and Ms. Sirignano's name. So I wanted to report
3 that to the Court, that because my name was mentioned
4 in there, that doesn't mean that I was the one who
5 fed her any information. That's not true.

6 THE COURT: All right. Thank you
7 Mr. Blackburn.

8 MR. BLACKBURN: Thank you.

9 THE COURT: Ms. Jacks?

10 MS. JACKS: Good morning, Your Honor.

11 THE COURT: Good morning, Ms. Jacks. Did
12 you have a chance to look at this Defendants'
13 Suggestion That the Government -- get the exact title
14 here -- Defendants' Suggestion That the Government is
15 More Violent Than Defendants -- did you have a chance
16 to review that document before it was filed?

17 MS. JACKS: No.

18 THE COURT: Have any thoughts about it this
19 morning?

20 MS. JACKS: I don't.

21 THE COURT: Do you have a position on the
22 Government's motion to strike it?

23 MS. JACKS: I'll submit.

24 THE COURT: All right. Thank you, Ms.
25 Jacks.

1 Mr. Jewkes, if you'll come up to the podium
2 here. Did you have a chance, Mr. Jewkes, to review
3 this before it was filed?

4 MR. JEWKES: The motion, no, Your Honor.

5 THE COURT: I guess it's what Mr. Benjamin
6 has called the response that the Defendants'
7 Suggestion That the Government is More Violent Than
8 Defendants.

9 MR. JEWKES: I have not reviewed it, Your
10 Honor.

11 THE COURT: Do you have any thoughts about
12 it this morning?

13 MR. JEWKES: No, Your Honor.

14 THE COURT: Any position on whether it
15 should it be stricken or not?

16 MR. JEWKES: Not having read the response,
17 Your Honor, I take no position.

18 THE COURT: All right. Thank you,
19 Mr. Jewkes.

20 Mr. Lowry. Good morning, Mr. Lowry.

21 MR. LOWRY: Good morning.

22 THE COURT: Did you have a chance to review
23 this document before it was filed?

24 MR. LOWRY: No, I didn't, Your Honor.

25 THE COURT: Do you have any thoughts about

1 it this morning?

2 MR. LOWRY: I do, Your Honor. And I
3 haven't read the document at all, frankly. But I
4 understand the tenor of the conversation this
5 morning. But I think it would be appropriate, maybe
6 at this time for the Court to issue a gag order on
7 all parties to not talk to the press. I mean, this
8 should be litigated in this courtroom, and not in the
9 media, frankly, is my thought on it.

10 My practice, ever since I had my bar card,
11 has been not to litigate my cases in the media. And
12 I think it's inappropriate to try to reach, you know,
13 a potential jury pool from either side. And I think
14 there has been a lot of press in this case. And I
15 would like to see it, you know, mollified to the
16 degree the parties have control over that. So that
17 would be my request, Your Honor.

18 THE COURT: All right. Do you have a
19 position on the Government's motion that this
20 response should be stricken?

21 MR. LOWRY: No, I don't, Your Honor.

22 THE COURT: Thank you, Mr. Lowry.

23 Ms. Duncan, did you have a chance to review
24 this document, this Defendants' Suggestion That the
25 Government is More Violent Than the Defendants before

1 it was filed?

2 MS. DUNCAN: Your Honor, I did not review
3 it before it was filed.

4 THE COURT: Do you have any thoughts about
5 it this morning?

6 MS. DUNCAN: I've reviewed it now sitting
7 here in court. I understand the Court's concerns,
8 but I also understand Mr. Benjamin's point.

9 THE COURT: Well, tell me -- because other
10 than what the title says, but I guess I'm trying to
11 figure out how that is maybe an appropriate response
12 to the Government's motion in limine about personal
13 information of the Government's witnesses.

14 MS. DUNCAN: I think I understand Mr.
15 Benjamin's point about the Government and many
16 pleadings, including the one about personal
17 information, puts out in the public arena information
18 about our clients that's intended to scare the public
19 and the Court. And so I see that he was trying to
20 respond to that, because it is unfair. I understand
21 and share the Court's concern about putting so much
22 information about Mr. Acee in the front of it, but I
23 do --

24 THE COURT: I mean, is it your sense it was
25 filed in frustration?

1 MS. DUNCAN: I think that's probably fair.
2 And also I think to say that these issues need to
3 sort of be litigated on the law and the facts of this
4 case, and not on portraying the defendants as these
5 horribly violent people, for whom special rules
6 should apply.

7 So it may not have been drafted as artfully
8 as Mr. Benjamin would have wanted it to, but I think
9 that the point is a valid one.

10 THE COURT: All right. And your thoughts
11 on the position as to the Government's request that
12 this Defendants' Suggestion That the Government is
13 More Violent Than the Defendants, that -- their
14 motion to strike?

15 MS. DUNCAN: I mean, I'm a little bit torn
16 between taking no position and opposing. And I think
17 where I'm torn is I hear Mr. Castellano's point about
18 the media picking up on this motion, and I don't
19 think any of us want that to happen. But, you know,
20 there has been a lot of negative press about our
21 clients taken from the Government's presentation. So
22 standing up here right now, Your Honor, I'd have to
23 say I take no position.

24 THE COURT: All right. Thank you, Ms.
25 Duncan.

1 Ms. Sirignano. Ms. Sirignano, did you have
2 an opportunity to review this Defendants' Suggestion
3 That the Government is More Violent Than Defendants
4 before it was filed?

5 MS. SIRIGNANO: I reviewed it about 10
6 minutes ago, Your Honor, during --

7 THE COURT: But not before it was filed?

8 MS. SIRIGNANO: No, Your Honor.

9 THE COURT: Do you have any thoughts on the
10 Government's request or what we've been talking about
11 this morning?

12 MS. SIRIGNANO: Your Honor, my only thought
13 is that Mr. Benjamin did what all the defense agreed
14 to, which was to circulate the pleading beforehand to
15 everybody. And it was. And no one responded to him
16 during that circulation. So I take some
17 responsibility for not even looking at the
18 circulation and giving him some feedback on that, as
19 I was preparing, myself, for these hearings. But we
20 do have a significant amount of trust with each
21 other. And that was the agreement that we came to.

22 I take no position on the Government's
23 position. I take no position on that motion, since I
24 just read it, Your Honor.

25 And I'd like to comment on the media.

1 Similar to Mr. Blackburn, during the break, the
2 afternoon break -- this Journal reporter was here for
3 a couple of days. I didn't know who she was. I've
4 never met her before. Apparently, she was a reporter
5 on the border, Ms. Harbour-Valdez told me, for
6 another news outlet. She approached me, gave me her
7 business card; you know, asked if I had any comments
8 about the informant and Mr. Perez on the stand.

9 And I said I couldn't comment. Because in
10 Mr. Garcia's drug case, if you recall, we had a
11 gentlemen's agreement, so to speak, with the
12 Government and Mr. Garcia's defense, after I filed
13 the media motion, that we wouldn't talk to the press.
14 And I told her that straight out. And I said, "I'm
15 sorry I can't talk to you, but, you know, all the
16 pleadings are in the record, and you're welcome to
17 pull up the pleadings."

18 So similar to Mr. Blackburn, I saw the
19 article. And I was shocked because there were a
20 number of incorrect names. And Mr. Castellano's name
21 was wrong. And like Mr. Blackburn, we both got
22 ribbed really good for being two of the best defense
23 attorneys in the state, which I wouldn't agree with,
24 with my colleagues that are here, and from out of the
25 town. So I was shocked when that article came out.

1 I did not disclose one bit of information to that
2 reporter other than telling her that all the
3 pleadings were online, Your Honor.

4 THE COURT: When you say "media motion,"
5 what are you referring to?

6 MS. SIRIGNANO: If you recall the
7 15-CR-4275 drug case. I had filed a motion to bar
8 extrajudicial statements in that case. And during
9 our hearings in the drug case, the parties agreed,
10 and a "gentlepersons' agreement" -- those were your
11 words -- that we would not talk to the media about
12 this case. And I have not done that, Your Honor. I
13 have not broken my word with that. I hope you
14 understand that.

15 THE COURT: All right. And do you have a
16 position on the Government's motion to strike?

17 MS. SIRIGNANO: I have no position, Your
18 Honor.

19 THE COURT: All right. Thank you, Ms.
20 Sirignano.

21 Mr. Adams. And did you have an opportunity
22 to review the Defendants' Suggestion That the
23 Government is More Violent Than Defendants before it
24 was filed?

25 MR. ADAMS: I had the opportunity. I did

1 not read it. I went back, when this conversation
2 started this morning -- apparently, it was sent
3 around on Friday. I had a lengthy sentencing on
4 Friday. I didn't read it. I should have, and I did
5 not.

6 THE COURT: Do you have any thoughts about
7 what we've been discussing this morning?

8 MR. ADAMS: I do have thoughts on it. We
9 have a working agreement among the defense lawyers.
10 And I want to support the defense lawyers in that
11 relationship. And so the last thing I'd want to do
12 is throw Mr. Benjamin under the bus, when he sent it
13 around and asked us for input, and we didn't give it
14 to him.

15 I would say, if you're inclined to strike
16 it, or think it's an inappropriate filing, I
17 understand where you're coming from. I think I would
18 ask if it's a friendly alternative, would be to allow
19 us to withdraw it, and either make amendments that we
20 all are participating in, or file it under seal, or
21 do something else, so that the thrust of what his
22 verbal statements to you on why he believed it was
23 relevant, that matter could still be pursued as he
24 sees fit.

25 THE COURT: All right. Thank you, Mr.

1 Adams.

2 MR. ADAMS: Thank you.

3 THE COURT: Mr. Maynard, did you have a
4 chance to review this before it was filed?

5 MR. MAYNARD: I believe I had an
6 opportunity, Your Honor, but I didn't get around to
7 it.

8 THE COURT: All right. And any thoughts
9 about what we've been discussing this morning?

10 MR. MAYNARD: Not any additional thoughts.
11 I understand -- I think it was done in part out of
12 the frustration. The pleadings of the Government
13 have been implying that the defendants are dangerous
14 on an ongoing basis. And I think counsel for the
15 defense has been feeling that's been exaggerated and
16 unfair. And, of course, now the Government is
17 feeling offended.

18 And so, in any case, I have nothing really
19 additional to add.

20 THE COURT: Do you take a position on their
21 request that it be struck, or --

22 MR. MAYNARD: Well, basically, I kind of
23 agree with Mr. Adams' position, that perhaps in lieu
24 of that, an opportunity to withdraw and amend.

25 THE COURT: All right. Thank you, Mr.

1 Maynard.

2 Ms. Bhalla? Did you have a chance to
3 review the Defendants' Suggestion That the Government
4 is More Violent Than Defendants before it was filed?

5 MS. BHALLA: No, Your Honor, I did not.

6 THE COURT: And do you have any thoughts
7 about what we've been discussing this morning?

8 MS. BHALLA: I do, Your Honor. I think
9 that I'm of a similar mind of Ms. Duncan. I
10 understand why it was done. And I understand the
11 sympathy. My brother is a creative writer. I think
12 he would have liked it. I don't know that that --
13 you know, I understand the sentiment and I understand
14 why he did it, and I certainly want to support him in
15 that.

16 I do think, though -- I mean, I'm sort of
17 anticipating the Court's next question -- that
18 perhaps filing it under seal may be appropriate, or
19 some other remedy.

20 THE COURT: You oppose the motion to
21 strike?

22 MS. BHALLA: I don't know that I oppose it,
23 but I think there are other ways to deal with it,
24 Your Honor.

25 THE COURT: All right.

1 MS. BHALLA: And if I may --

2 THE COURT: You may.

3 MS. BHALLA: Your Honor, I wanted to put a
4 little something on the record about the media. We
5 had talked as a group about dealing with that in a
6 motion in limine. And I contacted Mr. Beck about
7 their position on that, so that we didn't have to
8 file unnecessary motions. And I think we all sort of
9 came to a gentlemen's agreement on that issue.

10 And I was a little late in sharing that
11 agreement with everyone. I think I sent it out -- I
12 think seeing the article, I was like, Oh, my gosh, I
13 need to send that out so everybody knows. I
14 certainly don't think that anyone has violated that
15 agreement, based on the conversations we had today.
16 But I did want to put that on the record that I had
17 that conversation with the Government. And I think
18 we are all willing to do that and willing to continue
19 doing that, Your Honor.

20 THE COURT: Thank you, Ms. Bhalla.

21 Ms. Fox-Young. And did you read the
22 Defendants' Suggestion That the Government is More
23 Violent Than Defendants before it was filed?

24 MS. FOX-YOUNG: Good morning, Your Honor.
25 I did not.

1 THE COURT: Do you have any thoughts about
2 what they've been discussing this morning?

3 MS. FOX-YOUNG: Your Honor, I know the
4 Court's going to ask me if I oppose a motion to
5 strike this pleading. I think I do. And I think a
6 better remedy would be to seal it. And I wouldn't
7 oppose sealing it. I think there is a lot of
8 inflammatory, personal, sensitive information in this
9 case. And the parties -- one way that we've been
10 able to deal with that is to agree to seal pleadings,
11 or for the Court to intervene and seal pleadings.

12 THE COURT: All right. Thank you, Ms.
13 Fox-Young.

14 MS. FOX-YOUNG: Just one further comment on
15 the issue of the press. The Court is well aware that
16 this is a public courtroom, and we'll have a public
17 trial. I don't think that the parties can do
18 anything to control access to the courtroom by the
19 press. And I don't know what the Court has in mind.
20 But, you know, this is something that we're going to
21 have to deal with. And I hope that the Court doesn't
22 think that the mere appearance of an article or any
23 press coverage of this case is an indication that the
24 defense has done something to inspire it. You know,
25 I think we're going to deal with this in the coming

1 weeks, and we'll probably see reporters in here. So
2 that's just a consequence of having a public trial.

3 THE COURT: All right. Thank you, Ms.
4 Fox-Young.

5 MS. FOX-YOUNG: Thank you, Judge.

6 THE COURT: Mr. Roberts? I guess it will
7 be Ms. Torracco. But she didn't sign it, so I'll move
8 on.

9 Ms. Arellanes, did you review the
10 Defendants' Suggestion That the Government is More
11 Violent Than Defendants before it was filed?

12 MS. ARELLANES: Not before it was filed,
13 Your Honor. I had read it last night.

14 THE COURT: Do you have any thoughts about
15 what we've been talking about this morning?

16 MS. ARELLANES: Judge, I thought the motion
17 was a little bit over the top but I would suggest --

18 THE COURT: The motion or the defendants'
19 suggestion?

20 MS. ARELLANES: The motion.

21 THE COURT: The Government's motion.

22 MS. ARELLANES: I beg your pardon?

23 THE COURT: The Government's motion in
24 limine?

25 MS. ARELLANES: No, the defendants' motion,

1 I'm sorry, was a little bit over the top. What I
2 would suggest to the Court -- I would echo Mr. Adams'
3 suggestion, and that is to amend, and maybe perhaps
4 more artfully address the issue.

5 THE COURT: All right, and -- okay. Thank
6 you, Ms. Arellanes.

7 MS. ARELLANES: Thank you, Your Honor.

8 THE COURT: Mr. Castellano, I'll give you
9 the final word on your motion.

10 MR. CASTELLANO: Related to my motion, a
11 number of people have referred to page 2 of our
12 motion which refers to Anthony Baca discussing the
13 murder of the cooperators' family, as well as finding
14 public officials' addresses. That was actually
15 already public record from the James hearing. Those
16 are statements already brought out. That was not
17 additional information we filed in the pleading. So
18 I need to make that point.

19 Related to the article, I read it briefly.
20 I saw there was a lot of inaccuracies in there. We
21 had nothing to do with it. And when I read it, I
22 didn't suspect that any of the defense team had
23 anything to do with it. I thought it was a reporter
24 who just really didn't get it right at all, because
25 of all the inaccuracies in there.

1 But related to the motion, I would just ask
2 that it be stricken. If they want to file a separate
3 response, that's fine. But I just -- I would prefer
4 very much that it not be on the docket, and not be
5 accessible, especially by the press, given the
6 contents of the document.

7 THE COURT: There has been a number of
8 suggestions by some of the lawyers on behalf of some
9 of the clients that it be sealed rather than
10 stricken. Would that satisfy the Government?

11 MR. CASTELLANO: Yes, if the Court is not
12 going to strike the pleading, that would be a viable
13 alternative, because then, once again, it would be
14 off the public record and away from the press. I do
15 have my first preference, but that would be an
16 acceptable second choice.

17 Thank you, Your Honor.

18 THE COURT: All right. Thank you, Mr.
19 Castellano.

20 Mr. Benjamin.

21 MR. BENJAMIN: Your Honor -- and I've
22 heard -- as I stood here in front of the Court
23 earlier and told the Court that I didn't think I
24 wasn't conveying things very well -- I've heard many
25 people articulate things much more eloquently than I

1 can. And I guess I need to tell the Court that,
2 obviously, I think the Court appears bothered by the
3 title of the motion -- or the response. I can
4 understand that, Your Honor. But I do think a very
5 valid suggestion is because I don't have any desire
6 in this -- my goal in this response was not to have
7 this attract press or attract attention that way. So
8 I guess I would move to seal -- essentially, I think
9 you have to seal the motion and the response -- but I
10 would move to seal that. I think that, if I'm
11 understanding the Government's position correctly,
12 that would seal or would -- excuse me, I'm
13 tongue-tied -- that would end their concern about it
14 being public record.

15 My issue is not that it become public
16 record so much as my issue was raising what I believe
17 have been the characterizations. And so, you know,
18 to the extent that the Court may have changed its
19 opinion of me based upon that writing, I apologize to
20 the Court and the Government, Your Honor. And I also
21 take full responsibility, Your Honor, for the
22 drafting of that, and also attaching everybody else.

23 Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Benjamin.

25 MR. BENJAMIN: Yes, Your Honor.

1 THE COURT: Anything further, Mr.
2 Castellano?

3 MR. CASTELLANO: No, Your Honor.

4 THE COURT: Who just got on the phone?
5 There was somebody that came on the phone. Who just
6 got on?

7 THE CLERK: It's K'Aun, Judge.

8 THE COURT: All right. Good morning to
9 you, Ms. Wild.

10 THE CLERK: Good morning.

11 THE COURT: Let me ask across the board:
12 Do any of the defendants oppose sealing this
13 document? Not hearing anybody, I'll assume that no
14 defendants, including all the defendants and lawyers
15 that actually joined this motion, do not oppose
16 sealing it.

17 How do you feel, Mr. Castellano, about Mr.
18 Benjamin's request that the Government's motion also
19 be sealed on this; that the pleadings on both sides
20 of this be sealed?

21 MR. CASTELLANO: I think it's fine, Your
22 Honor. It's already a resolved issue in this case.
23 There is no objection to that.

24 THE COURT: All right. So that I am as
25 evenhanded as I can be here, I will seal both -- what

1 I thing is 1520 -- is that your motion, Mr.
2 Castellano?

3 MR. CASTELLANO: It is, Your Honor.

4 THE COURT: So 1520 and 1586 will be
5 sealed. And the reason I do that is because I think,
6 as we get a little closer to trial, maybe we don't
7 need some of this information being reported in the
8 press. I think it will make it harder for everybody
9 to try it. It is part of the record. And we'll
10 leave it there. But we won't necessarily have it
11 floating around, making it more difficult to try the
12 case.

13 Let's just be careful. I mean, this is
14 going to be a difficult month for everybody. They're
15 going to get frustrated. There is going to be
16 feelings that, you know, because somebody does this,
17 I've got to do this in response. I think, by and
18 large, y'all have been pretty good about avoiding
19 that, and trying to avoid it. It's very difficult in
20 a case like this for there to be moral equivalency on
21 both sides. We all know in our system the Government
22 gets to charge people with crimes. And we know
23 that's a very serious thing. They have a lot of
24 responsibilities when they do that. As a result, we
25 put a lot of bennies and benefits on the defendants'

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1 side to try to make sure that the charges are
2 resolved as fairly and impartially as we possibly
3 can. I think everybody in the room is aware that
4 we've got to pick a jury here in about 39 days. And
5 I don't think it's in any of us' benefit to make that
6 job more difficult for anybody. I don't think
7 anybody gains anything. The Court doesn't get
8 anything out of it by making it more difficult. And
9 the Government doesn't gain anything. They're
10 wanting to get this thing to trial. So they don't
11 gain anything and, I don't think the defendants gain
12 anything by getting stuff in the press. As the
13 article that's there, I mean, you know, talking about
14 some of the testimony from last week, I don't think
15 that helps the defendants.

16 So, you know, we've got a little issue here
17 we've dealt with, and we'll move on. But just give
18 some thought about everything you write and
19 everything you say, be it in the courtroom, outside
20 of the courtroom, that we've all got to work together
21 to get this thing to a resolution, and we can do
22 things that make it more difficult, or we can do some
23 things and check our frustrations and make sure that
24 what we're responding to is really responsive to the
25 briefing, rather than not.

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1 When I read the response, I was surprised
2 by it. I kept thinking that maybe there was
3 something that I was missing, because I couldn't
4 figure out how it responded. Then, when we discussed
5 the motion in limine in here, we came to a resolution
6 so quickly. And when I reread the response, I still
7 had a hard time figuring out how it responded to the
8 motion. And so just be careful in the sense that --
9 try to help the Court do its job. If I read
10 things -- and I do try to work very hard to read
11 everything and make sure I'm prepared -- that it's
12 helpful to the Court. It's really helping the Court
13 make a decision rather than it just being information
14 that: If they're going to slander me, I'm going to
15 slander them.

16 It's hard in these sort of cases for there
17 to be moral equivalency. It's just the nature of the
18 proceedings. So I think we have to sort of check
19 those impulses and be very careful. So I'll deny the
20 Government's motion to strike, but pursuant to the
21 stipulation of the parties, the motion and the
22 response will be placed under seal.

23 There was some suggestion of a gag order.
24 I guess I am always reluctant to place gag orders in
25 place. There is a First Amendment in this country.

1 And there is a lot about this case already in the
2 press. So unless somebody wants to really go down
3 that path, I would suggest we not. But if that's
4 where y'all want to go, then I'll certainly entertain
5 a formal motion on that and not prejudge it. There
6 does seem to be some discussion among the parties
7 that at this point going forward, there will be no
8 discussions with the press. And, perhaps, it would
9 be useful to see if there is a gentlemen's and
10 gentleladies' agreement among the counsel that
11 they're not going to talk to the press. And if there
12 is, that might be useful to put on the agreement. As
13 I've indicated, I will enforce stipulations among the
14 parties.

15 Mr. Castellano, what's the Government's
16 thoughts on that?

17 MR. CASTELLANO: We would agree to that,
18 Your Honor.

19 THE COURT: The defendants, some brought it
20 up, some suggested it; is there any defendant,
21 defendant's lawyers, defendant's counsel that are not
22 here, or they're here, that you know of, that would
23 not agree to such a stipulation?

24 All right. I'm going to take that that
25 there is now an agreement in this case, 39 days out

1 from the trial, that there will be no discussion
2 among the lawyers or parties with the press. So that
3 will be an agreement among the parties, and I'll
4 certainly enforce that. If we're challenged by that
5 on the press, then we'll deal with it at that time.
6 But I think at the present time it's agreement among
7 the parties.

8 MR. CASTLE: Your Honor, this is Jim
9 Castle. I'm wondering if I could make a couple of
10 comments.

11 THE COURT: Certainly, Mr. Castle.

12 MR. CASTLE: Yes. First of all, now that
13 I've had an opportunity to review the motion by Mr.
14 Benjamin, my only comment is that my name is on that
15 motion, and so I'm as responsible for it as -- even
16 more responsible for Mr. Benjamin, because it was
17 myself and a couple of others who suggested we divvy
18 up motions. So if there is any fault to be laid, I
19 want the Court to know that I accept that
20 responsibility.

21 But the second matter I'd like to bring up
22 is we're about to go into motions in limine
23 concerning our clients' alleged bad acts. And in
24 that -- in those pleadings, the prosecution has set
25 forth a litany of bad acts, ranging from the minor to

1 grand. And I don't believe those are sealed. And in
2 the interests of having a fair trial for the
3 defendants, as well as the Government, I believe
4 those responses, if they're not suppressed from
5 public view, should be at this time.

6 THE COURT: Well, I'm getting concerned
7 here. These are public proceedings. And I have
8 resisted everything being filed under seal. I'm just
9 going to leave the two documents we talked about
10 unsealed; just hope that the press is not interested
11 in the one that was filed. But I'm not going to sit
12 here and start sealing stuff that -- keeping from the
13 press the information. So if y'all want to talk
14 about it afterwards -- but I think to start just
15 sealing stuff willy-nilly, where we are in this case,
16 I'm reluctant to do it.

17 So I'm going to deny the request to seal
18 documents that have been filed publicly. I'm going
19 to deny the request to strike. I'm going to deny the
20 request to file under seal. And we're just going to
21 move on with the case.

22 All right. Did you have anything, Mr.
23 Blackburn?

24 MR. BLACKBURN: Just briefly, Your Honor.
25 I've spoken to Mr. Castellano, and I think it's

1 important that all of the defendants and the lawyers
2 meet to discuss this; not that we have any issue with
3 the semi gag order. But, you know, it puts us in a
4 bad position, as you well know, when somebody from
5 the press comes up and says: What about this? Are
6 you taking -- when is this motion going to be heard?
7 So I think that we sort of agree that there shouldn't
8 be any comment on any substantive matter. But we
9 would like to formulate that with the Government, and
10 also maybe formulate how we would deal with these
11 issues that we're talking about this morning, if we
12 can agree as to something as to those motions,
13 whether they be sealed or otherwise.

14 So we agree -- I mean everybody in this
15 room has done enough of these trials to know not to
16 comment on any substantive matters. But at the same
17 time, we want to formulate that and make clear that
18 everybody on the defense side knows that, and come to
19 an agreement with the Government. Does the Court
20 understand what I'm trying to get at?

21 THE COURT: Do you agree with that, Mr.
22 Castellano? You'll work on an agreement before we
23 put one together this morning?

24 MR. CASTELLANO: Yes, Your Honor.

25 THE COURT: Anybody have any disagreement

1 with that? Mr. Cooper?

2 MR. COOPER: No, Your Honor.

3 THE COURT: Mr. Adams.

4 MR. ADAMS: No, sir, Your Honor.

5 THE COURT: All right. Are we ready to
6 take up the FBI agent for his testimony or her
7 testimony?

8 MR. BECK: Your Honor, the United States
9 asks the Court to consider reconsidering the motion
10 to strike. I think the Court is right to point out
11 that that does not respond to a motion. What I glean
12 from that is that they don't oppose our motion in
13 limine to not get into personal information about
14 witnesses. And I think a proper response would be
15 that: They don't oppose that.

16 THE COURT: I'll think about it. But at
17 this point, I'm not granting the Government's
18 request.

19 All right. Do you have your witness on the
20 motion to suppress Eric Duran's recordings?

21 MR. BECK: Yes, Your Honor.

22 MR. CASTELLANO: The witness will be
23 Special Agent Brusuelas with the FBI.

24 THE COURT: Ms. Brusuelas, if you'll come
25 up and stand next to the witness box on my right,

1 your left. Before you're seated --

2 MS. HARBOUR-VALDEZ: Your Honor, is this
3 1325 or 1328?

4 MS. DUNCAN: 1325, which is our motion to
5 suppress Eric Duran's testimony and statements.

6 THE COURT: All right. If you'll raise
7 your right hand. Before you're seated, my courtroom
8 deputy, Ms. Standridge, will swear you in.

9 KATHERINE BRUSUELAS,
10 after having been first duly sworn under oath,
11 was questioned and testified as follows:

12 DIRECT EXAMINATION

13 THE CLERK: Please be seated. State and
14 spell your name for the record.

15 THE WITNESS: My name is Katherine
16 Brusuelas, K-A-T-H-E-R-I-N-E. Brusuelas is
17 B-R-U-S-U-E-L-A-S.

18 THE COURT: Ms. Brusuelas, Mr. Castellano.

19 MR. CASTELLANO: Thank you, Your Honor.

20 THE COURT: Let me ask, on this particular
21 motion there was some debate in the motion itself as
22 to who had the burden of proof. I didn't quite
23 understand Mr. Baca's response. Are you in
24 agreement, Ms. Duncan, that on this motion the
25 defendant has the burden of proving that a third

1 party's statements and actions were involuntary?

2 MS. DUNCAN: Yes, Your Honor. I think that
3 there are two different issues. There is -- one is
4 are Eric Duran's statements and his testimony
5 involuntary? On that, I do believe that the Tenth
6 Circuit law is that the defense bears that burden.

7 The second question is whether Mr. Duran's
8 decision to record -- consensually record statements
9 is voluntary. And my understanding of Tenth Circuit
10 law is that the burden is on the Government to make
11 that showing.

12 THE COURT: Do you agree with that, Mr.
13 Castellano?

14 MR. CASTELLANO: I think so, is my best
15 answer. I'm looking at the Dowell case. It's 430 F.
16 3d 1100, 2005, Tenth Circuit.

17 THE COURT: If the question is what -- if
18 you're saying that the Government has the burden of
19 proof of showing that Mr. Duran's actions in
20 recording Mr. Baca, that the Government has to prove
21 those were voluntary, what burden are you assuming on
22 behalf of Mr. Baca?

23 MS. DUNCAN: So my understanding is that
24 because Mr. Duran's statements to law enforcement --
25 so, for example, Agent Brusuelas participated in an

1 interview with Mr. Duran in February of 2015. So our
2 argument is that those statements were coerced, and
3 that his statements after that, continuing to his
4 trial testimony, are coerced. And it's my
5 understanding because Mr. Duran is not a defendant,
6 that we bear the burden of showing that those
7 statements and testimony are coerced.

8 THE COURT: So you're assuming the burden
9 on his statements, but on his actions in recording,
10 you think that remains with the Government?

11 MS. DUNCAN: That's correct. I think
12 that's what the cases hold.

13 THE COURT: And you're uncertain of that?

14 MR. CASTELLANO: I'm not sure I agree with
15 that, Your Honor. I'm look at the Dowell case. And
16 I do agree, if we're introducing the defendant's
17 statement, we have to establish voluntariness.

18 THE COURT: I think they're agreeing that
19 on the statements of Mr. Duran they bear the burden.
20 The only burden that they're saying remains or is
21 shifted or with the Government is the one on whether
22 Mr. Duran's actions in recording Mr. Baca were
23 voluntary.

24 MR. CASTELLANO: I think we're going to
25 establish that they were voluntary. But I'm still

1 not convinced that that's the burden. In the Dowell
2 case, the defendant failed to meet the burden of
3 presenting sufficient evidence to create a serious
4 factual dispute, suggesting that Sherman's confession
5 to police was involuntary. And when a defendant
6 makes a motion to exclude coerced testimony of a
7 third party on due process grounds, the burden of
8 proving improper coercion is upon the defendants. So
9 actually two things happen. One is what happened at
10 the time, and the other is actually what happens at
11 trial. Is the person's testimony at trial coerced or
12 not? And, of course, we won't get there until trial.
13 But --

14 THE COURT: But you have no problem
15 proceeding first with your evidence?

16 MR. CASTELLANO: No, no problem at all,
17 Your Honor. We had Agent Brusuelas here, so we
18 figured we'd put her on. So we are prepared to go
19 first.

20 THE COURT: All right. Mr. Castellano.

21 MR. CASTELLANO: And, Your Honor, in terms
22 of marking exhibits, are we going to ahead and
23 start --

24 THE COURT: We're starting with a new
25 motion. Unless anything is being pulled over into

1 this one, let's keep it separate. So why don't you
2 start with Government's Exhibit 1 unless there is
3 something, some other hearing that I need to look at
4 for this motion.

5 MR. CASTELLANO: We're fine. We'll start
6 with Government's Exhibit 1 this morning.

7 EXAMINATION

8 BY MR. CASTELLANO:

9 Q. Good morning.

10 A. Good morning.

11 Q. How are you employed?

12 A. I am currently a Special Agent with the
13 Federal Bureau of Investigations.

14 Q. How long have you been a Special Agent?

15 A. A little over 21 years.

16 Q. And let me take you back to February 25 of
17 2015. What were your responsibilities during that
18 timeframe?

19 A. I was assigned to work gangs and drugs.
20 And I was also assigned to work a new prison
21 initiative that the FBI was starting up.

22 Q. What were your responsibilities related to
23 that initiative?

24 A. I would go to the different Department of
25 Corrections facilities in Albuquerque and speak with

1 them. I would go up to the Santa Fe -- the PNM
2 facility once to twice a week.

3 Q. For what purpose?

4 A. I would work with the STIU investigators up
5 there. And I would investigate any drugs and things
6 that were being brought into the prison by corrupt
7 guards or inmates that were willing to cooperate, or
8 just things that were happening in the prison.

9 Q. I want to ask you if on February 25 --
10 excuse me, February 19, 2015, you met with someone
11 named Eric Duran?

12 A. Yes.

13 Q. How is it that you came to meet him?

14 A. Captain Sapien had come to me, at least a
15 week or so prior to that date, and informed me that
16 there was an individual in the facility that wanted
17 to come forward and cooperate on unsolved homicides
18 and different drugs and things, large volume of drug
19 dealing throughout the Albuquerque area.

20 Q. You mentioned the call happened
21 approximately a week prior to your meeting. What
22 explains the gap, or what took you that amount of
23 time to meet Mr. Duran?

24 A. The logistics. We had to find a facility
25 where we could do the interview and get him

1 transported to that facility. And I was also having
2 other detectives sit in on the interview who might be
3 familiar with the different homicides.

4 Q. Do you know if the interview was recorded?

5 A. Yes, it was.

6 Q. And was a transcript made from that
7 recording?

8 A. Yes.

9 MR. CASTELLANO: May I approach the
10 witness, Your Honor?

11 THE COURT: You may.

12 Q. Agent Brusuelas, I'm handing you what's
13 been marked for identification as Government's
14 Exhibit 1.

15 A. Okay.

16 Q. Do you recognize that exhibit?

17 A. Yes.

18 Q. Is that a transcript of at least part of
19 that conversation?

20 A. Yes.

21 MR. CASTELLANO: Your Honor, I'd move the
22 admission of Government's Exhibit 1.

23 THE COURT: Any objection, Ms. Duncan?

24 MS. DUNCAN: Your Honor, I have no
25 objection. I would note for the record that this

1 transcript is incomplete. But we will be adding --
2 it doesn't capture about 35 minutes of the interview.
3 So we'll be submitting a more full transcript later
4 in these proceedings.

5 THE COURT: All right. Thank you,
6 Ms. Duncan.

7 Anybody else have any objection to
8 Government's Exhibit 1?

9 MS. JACKS: No. Just for the record, could
10 we have the Bates stamp number?

11 MR. CASTELLANO: Yes, it's 31520 of DeLeon.

12 THE COURT: Any other objection, comments?
13 Government's Exhibit 1, not hearing any objection,
14 will be admitted into evidence.

15 BY MR. CASTELLANO:

16 Q. Agent Brusuelas, I would introduce the
17 exhibit, but for purposes of your testimony I'm going
18 to talk about a highlighted version of that exhibit
19 for ease of your testimony. But as part of your
20 meeting with Mr. Duran, how was it that you were
21 introduced to him?

22 A. Captain Sapien introduced us as an
23 individual who had information that wanted to come
24 forward and provide that information to the FBI.

25 Q. I'm showing you the first page of that

1 document. It's page 31520. Do you recall discussion
2 about Mr. Duran's motivation for being there at the
3 meeting?

4 A. Yes.

5 Q. Was there any indication to you by him that
6 he was in any type of trouble?

7 A. No.

8 Q. And, basically, what was his motivation for
9 being there?

10 A. His motivation -- when he was asked early
11 on in the interview, he informed that he felt it was
12 part of his rehabilitation; that he needed to come
13 forward and cooperate. There were a lot of bad
14 people out there that were getting away with murder.
15 And he wanted to help and do his part. He felt like
16 he had taken so much from the community, and now he
17 wanted to give back. And he also had a trust for the
18 STIU investigators, both Investigator Cupit and
19 Captain Sapien.

20 Q. I'm showing you page 31521. There is
21 mention of someone named Anthony Baca?

22 A. Yes.

23 Q. Did you know that name when you met with
24 Mr. Duran?

25 A. Yes, I did.

1 Q. How did you know that name?

2 A. From prior investigations.

3 Q. And what was your recollection of what you
4 knew about Mr. Baca at that point in time?

5 A. He was one of the leaders of the prison
6 gang, SNM.

7 Q. And did Mr. Duran discuss other members or
8 leaders of the gang?

9 A. Yes, he did.

10 Q. And you mentioned a discussion of murders.
11 I'm showing you page 31526, and there is the name
12 Javier Molina on that page. Do you recall that
13 discussion?

14 A. Yes.

15 Q. Now, before this time, did you know
16 anything about the Javier Molina murder?

17 A. I did not.

18 Q. So who was the information coming from at
19 that point in time?

20 A. Mr. Duran.

21 Q. And do you see where he says that Mr. Baca
22 called it?

23 A. Yes.

24 Q. For what reason?

25 A. For Molina's cooperation with law

1 enforcement prior.

2 Q. I'm showing you page 31527. Do you see
3 there an indication of how the paperwork traveled in
4 this case?

5 A. Yes.

6 Q. How did that happen?

7 A. The paperwork came from Santa Fe from an
8 individual named David Calbert, and it went down to
9 this facility in Las Cruces.

10 Q. Turning to page 53128 of that exhibit.
11 I've also highlighted a portion here. Was Mr. Duran
12 able to lay out more of the murder and some of the
13 other participants in that murder?

14 A. Yes, he was.

15 Q. And looks like it may be misspelled, but
16 there is a person identified as Archie?

17 A. Yes.

18 Q. And do you see the name "Dan Dan" there?

19 A. Yes.

20 Q. At that point in time did you know who "Dan
21 Dan" was?

22 A. I did not.

23 Q. What about the person named Mario?

24 A. I did not.

25 Q. And how about Jerry Armenta?

1 A. I did not.

2 Q. So from what you recalled, did you mention
3 these names first or did Mr. Duran?

4 A. Mr. Duran.

5 Q. Do you recall him -- this is page 31532 --
6 do you recall him discussing the murder of someone
7 named Freddie Sanchez or "Fred Dog"?

8 A. Yes.

9 Q. And was Mr. Duran able to tell you who he
10 believed called that murder?

11 A. Yes.

12 Q. Who was that person?

13 A. Arturo Garcia.

14 Q. And the same question regarding this
15 murder. Did you know anything about this one
16 beforehand?

17 A. I did not.

18 Q. Did Mr. Duran further explain to you who
19 else was involved with this murder?

20 A. Yes, he did.

21 Q. Do you see the name Benjamin Clark there?

22 A. Yes.

23 Q. What was his explanation of what happened
24 with Mr. Clark's involvement?

25 A. Mr. Clark, I believe, was the one that was

1 supposed to enforce that it occurred.

2 Q. And on page 31536 of this exhibit, there is
3 a question about who actually killed Freddie. Do you
4 see what Mr. Duran's response was?

5 A. Yes.

6 Q. Who was that?

7 A. "Wino."

8 Q. And did you know who "Wino" was at that
9 point?

10 A. I did not.

11 Q. And do you see any other name tied to the
12 name "Wino"?

13 A. Yes.

14 Q. Who was that person?

15 A. That would be Alonso.

16 Q. And what about discussion of another person
17 involved with the Freddie Sanchez murders?

18 A. Yes, he gave the name Edward Troup.

19 Q. And, ultimately, did someone ask him how he
20 actually knew this information?

21 A. Yes.

22 Q. What was Mr. Duran's response to how he
23 knew this?

24 A. He was present when Arturo gave the hit.

25 Q. Do you remember discussion of a person

1 named Sammy Chavez?

2 A. Yes.

3 Q. Did you know anything about that person
4 before your discussions with Mr. Duran?

5 A. I did not.

6 Q. And do you see the name there of who he
7 believed called that hit as well?

8 A. Yes.

9 Q. Who was that person?

10 A. That was also Arturo.

11 Q. Do you remember discussions of
12 Mr. Santistevan or Mr. Marcantel?

13 A. Yes.

14 Q. At that point in time, did you know who
15 either of those people were?

16 A. I did.

17 Q. Who was your understanding of who
18 Mr. Santistevan was?

19 A. Mr. Santistevan was -- he worked for the
20 Department of Corrections. He was actually one of
21 the supervisors that was head of the STIU.

22 Q. What about Mr. Marcantel?

23 A. Yes, Mr. Marcantel was the main guy over
24 there.

25 Q. And what did Mr. Cordova (sic) explain to

1 you about the way "Pup," or Mr. Baca, the way he felt
2 about those people?

3 A. He said he hated them, hated both of them.

4 THE REPORTER: Did you mean to say Mr.
5 Cordova?

6 MR. CASTELLANO: Mr. Duran, excuse me.

7 Q. And so at that point was it your
8 understanding that there was some sort of threat to
9 either Mr. Marcantel or Mr. Santistevan?

10 A. Yes.

11 Q. At that point in time, did Mr. Duran tell
12 you approximately how much time he had left in
13 prison?

14 A. He had approximately two years.

15 Q. Did Mr. Duran discuss narcotics
16 trafficking?

17 A. Yes, he did.

18 Q. And how would he describe himself as a
19 narcotics trafficker?

20 A. Mr. Duran had received a settlement, a
21 large amount of money, and he was able to purchase
22 large quantities of narcotics. So he said he had a
23 very good reputation for being a money man and being
24 a businessman, and he had lots of contacts that sold
25 large quantities of narcotics.

1 Q. Did he show an interest in cooperating
2 either against the SNM Gang or against other drug
3 dealers?

4 A. Yes, he did. He wanted to cooperate both
5 while he was in prison, and then once he was
6 released, when he was out on the streets.

7 Q. Let me show you another indication on page
8 31554 about Mr. Duran's discussions about whether he
9 was in trouble, or thought was in trouble?

10 A. Yes, several times throughout the
11 interview, he had mentioned that a lot of people do
12 come forward when they're in trouble. But he was not
13 in trouble, so he was coming forward because he
14 wanted to. He wanted to have a long-term working
15 relationship with us.

16 Q. And on page 31555, there is a discussion
17 about Mr. Duran having written a note?

18 A. Yes.

19 Q. What did you know about that note?

20 A. My understanding is there were a couple
21 notes written. One was to Captain Sapien informing
22 him that he wanted to cooperate with the FBI. And
23 then he began to draft another note to the FBI about
24 cooperation he wanted to help with. But when they
25 did a search of the different cells, that note was

1 recovered and taken with all his property.

2 Q. Did you ever see any of those notes?

3 A. I did not.

4 Q. Were you ever contacted because he had
5 written one of those notes?

6 A. Yes.

7 Q. Is that the contact that got you to the
8 prison in the first place?

9 A. Yes.

10 Q. And about how long before this meeting were
11 you notified that Mr. Duran wanted to meet with you?

12 A. It was several weeks before we actually
13 met.

14 Q. On page 31557 of that exhibit, do you see
15 there is discussion of a cellphone here?

16 A. Yes.

17 Q. Was it your understanding that a cellphone
18 had been confiscated from Mr. Duran?

19 A. Yes.

20 Q. And at this point did it appear that
21 Captain Sapien had any information about whether or
22 not Mr. Duran had been sanctioned for that?

23 A. No, he was not aware of it.

24 Q. On page 31558, I've highlighted a portion
25 here. What was Mr. Duran explaining to you about the

1 various roles of the various players in the Molina
2 murder?

3 A. He was describing which individuals, what
4 his participation was, who had the shanks, and who
5 did what.

6 Q. And do you see any discussion about cameras
7 here at the bottom of that paragraph?

8 A. Yes.

9 Q. What was the discussion about the cameras?

10 A. The cameras were supposed to be covered
11 during the time that the murder took place.

12 Q. And were they?

13 A. No, they were not.

14 Q. On page 31566, there is a discussion about
15 Mr. Duran's property, including his television. What
16 can you tell us about that part of conversation?

17 A. Mr. Duran was hoping that by his
18 cooperation he might be able to get commissary again,
19 and maybe get back some of his property. This
20 discussion here was -- he didn't -- he wasn't asking
21 for TVs or any other kind of electronics or anything.
22 And he wanted a lot of that stuff withheld so it
23 would look like he was still in some type of trouble.

24 Q. Now, when you met with Mr. Duran, was there
25 any discussion of an incident he had with a

1 corrections officer the day before?

2 A. No, there was not.

3 Q. Was there an indication that he might be
4 sanctioned for whatever happened the day before?

5 A. No.

6 Q. Did you know what happened the day before?

7 A. No.

8 Q. Did anyone there discuss what happened the
9 day before?

10 A. No.

11 MS. SIRIGNANO: Objection, leading.

12 THE COURT: Overruled.

13 Q. Did anybody threaten Mr. Duran?

14 A. Not that I was aware of, not during the
15 interview.

16 Q. Did anyone say: If you don't cooperate,
17 there will be consequences?

18 MS. SIRIGNANO: Objection, leading.

19 A. No.

20 THE COURT: Overruled.

21 A. Several times through the interview he
22 discussed what he provided to the FBI and how he
23 wanted to provide information. And he wanted it to
24 be a long-term relationship. Once he got out of the
25 incarceration, he would help on the streets. He had

1 lots of contacts. He realized it would put himself
2 in danger, and he was okay with that. He just wanted
3 to help out since he had done so many bad things
4 prior.

5 Q. And were you aware at that meeting of any
6 of the corrections officers indicating that Mr. Duran
7 was in any type of trouble?

8 A. They did not indicate at all during that
9 interview.

10 Q. After this meeting, did you agree to open
11 up Mr. Duran as a cooperator or a confidential human
12 source?

13 A. Yes.

14 Q. And about how long after this meeting did
15 that happen?

16 A. It was about a month after.

17 Q. And what did you do as part of that
18 meeting; in other, words was he admonished in any
19 way?

20 A. Yes, he was. He was informed that all the
21 information he would be providing would be voluntary.
22 He needed to be truthful in all information he
23 provided. He had to follow any rules that we had for
24 him. And we would try to protect his identity. We
25 also let him know that he wouldn't be an employee of

1 the federal government. He could not enter into any
2 contracts. And he could not do anything on behalf of
3 the Government without prior authorization. He was
4 informed that he wasn't having any promises made as
5 to immunity. And that any payments he received -- he
6 wouldn't be promised any payments, but if he received
7 any, he'd have to pay taxes.

8 Q. And are those general admonishments you
9 give to people who agree to cooperate with the FBI?

10 A. Yes.

11 Q. And during -- after that happened, did
12 Mr. Duran make any recordings in the prison system?

13 A. Yes, he did.

14 Q. And did Mr. Duran remain a source under
15 you, or was he ever transferred to anyone?

16 A. After a couple of months, he was
17 transferred to another agent.

18 Q. Who was that agent?

19 A. That would be Agent Bryan Acee.

20 MR. CASTELLANO: May I have a moment, Your
21 Honor?

22 THE COURT: You may.

23 MR. CASTELLANO: I pass the witness, Your
24 Honor.

25 THE COURT: Ms. Duncan, why don't I start

1 with you. Do you have cross-examination of Ms.
2 Brusuelas?

3 MS. DUNCAN: Thank you, Your Honor.

4 THE COURT: Ms. Duncan.

5 MS. DUNCAN: May I just have a moment to
6 get organized?

7 THE COURT: Certainly.

8 EXAMINATION

9 BY MS. DUNCAN:

10 Q. Good morning.

11 A. Good morning.

12 Q. You've testified that Captain Sapien
13 contacted you about a week before you met with
14 Mr. Duran; is that correct?

15 A. That's correct.

16 Q. And how did he contact you?

17 A. I was up at the facility once to twice a
18 week to see what was going on, and see what kind of
19 activities are happening that we could take on the
20 federal level. So while I was up there at the PNM
21 facility.

22 Q. And did you produce a report or any written
23 document to document that conversation?

24 A. With Captain Sapien?

25 Q. Yes.

1 A. No.

2 Q. What do you recall specifically about that
3 particular conversation?

4 A. I don't recall exact details of it.
5 Because there was many individuals that we talked
6 about every time that I went up there. But there was
7 an individual, Mr. Duncan (sic), who was willing to
8 cooperate. And, as I previously testified, he had
9 information on several unsolved murders, and drug
10 dealing large quantities of drugs in the Albuquerque
11 area.

12 Q. When you say "Mr. Duncan," you mean
13 Mr. Duran; correct?

14 A. I'm sorry. Yes.

15 Q. And then you said that it took some time to
16 put together the team to talk to Mr. Duran; is that
17 correct?

18 A. That's correct.

19 Q. How was that decision made who would
20 participate in the interview?

21 A. That was my decision as to what other task
22 force officers or law enforcement personnel I wanted
23 to meet with.

24 Q. And how did you prepare to interview
25 Mr. Duran?

1 A. I did not do any preparing to interview
2 him. We just went up to talk with him, to see what
3 information he actually had. We get a lot of people
4 who claim that they have information and want to
5 talk. And most of the time it's stuff that's not
6 validated. It's just they're trying to get something
7 from us, rather than actually cooperate and give
8 information.

9 Q. And you mentioned a letter Mr. Duran wrote
10 to Captain Sapien?

11 A. Yes.

12 Q. Did Captain Sapien ever show you that
13 letter?

14 A. No.

15 Q. Or provide with you a copy?

16 A. No.

17 Q. You testified that Eric Duran agreed to
18 cooperate because he wanted to give back to the
19 community; correct?

20 A. That is one of the reasons he stated.

21 Q. And that he said he was not in trouble?

22 A. That's correct.

23 Q. And that's not true, though; correct?

24 A. As far as I know, he was not in any trouble
25 from any activities other than why he was

1 incarcerated.

2 Q. Are you aware that on February 12 of 2015,
3 Mr. Duran was found in the possession of a shank at
4 the prison?

5 A. I was not at the time, no.

6 Q. And are you aware that on February 18,
7 2015, Eric Duran threatened to kill a correctional
8 officer?

9 A. I was not aware of that.

10 Q. And that, in threatening to kill the
11 correctional officer, he disclosed to the officers
12 and others the officer's home address?

13 A. I was not aware of that.

14 Q. And are you aware that he told law
15 enforcement that his then girlfriend had provided the
16 information to him about the officer?

17 A. No, I was not aware of that.

18 Q. Now, during the conversation with
19 Mr. Duran, though, he mentions the shank; correct?

20 A. Several shanks were mentioned during that
21 interview.

22 Q. And did you understand that one of those
23 shanks was his?

24 A. I don't believe we discussed a shank being
25 his from any recent incident.

1 Q. Let's see. I'd like to turn your attention
2 to page 53156 of the transcript. If you look here on
3 this page, y'all are discussing the shanks that were
4 seized during a shakedown. I'll point you here to
5 Eugene. Who is he?

6 A. He was one of the task force officers.

7 Q. So Eugene says, "What happened last week?
8 Y'all did a big shakedown;" correct?

9 A. That's correct.

10 Q. Then Chris Cupit responds, "Yeah, we did a
11 big shakedown;" correct?

12 A. Correct.

13 Q. Then Sergio is Sergio Sapien; correct?

14 A. Correct.

15 Q. And Sergio is talking about some photos of
16 those shanks; correct? He says, "Yeah, I got some
17 photos here. One of them is yours."

18 A. That's correct. I'm not sure if he's
19 talking about the shanks on that part of interview or
20 not.

21 Q. Do you recall seeing some photographs of
22 shanks during this interview?

23 A. I did not see photographs during that
24 interview, no. After the interview, I did see
25 photographs. But I don't recall exactly what I saw

1 them on.

2 Q. And in response to Mr. Sapien saying,
3 "Yeah, I've got some photos here, one of them is
4 yours," Eric Duran responds, "Yeah, some they used to
5 scratch trays," and he starts laughing; correct?

6 A. That's correct.

7 Q. And Mr. Sapien responds, "So this was found
8 in his house. It's an eyeglass, a little attention
9 getter"; correct?

10 A. That's correct.

11 Q. And then Mr. Duran responds, "That ain't
12 mine. As you see mine is there"; correct?

13 A. That's correct.

14 Q. So during this conversation Mr. Sapien and
15 Mr. Duran are talking about a shank that Mr. Duran
16 possessed, or was found in his house?

17 A. Yes.

18 Q. And are you aware that at the time --

19 THE COURT: Let me ask you, Ms. Duncan,
20 would this be a good time for us to take our morning
21 break?

22 MS. DUNCAN: It would, Your Honor.

23 THE COURT: All right. Thank you, Ms.
24 Duncan. All right. We'll be in recess for about 15
25 minutes.

1 (The Court stood in recess.)

2 THE COURT: All right. Let's go on the
3 record. Make sure everybody has got an attorney.
4 Looks to me like everybody has one.

5 All right. Ms. Brusuelas, I'll remind you
6 that you're still under oath. Ms. Duncan, if you
7 wish to continue your cross-examination of Ms.
8 Brusuelas, you may do so at this time.

9 MS. DUNCAN: Thank you, Your Honor.

10 THE COURT: Ms. Duncan.

11 BY MS. DUNCAN:

12 Q. So before the break you were talking about
13 Eric Duran's possession of a shank. And I'd like to
14 point out one other portion of this transcript. And
15 I'm looking at Bates No. 31560. Here in the middle
16 of the page, I've highlighted a statement from Eric
17 Duran where he says, "If you have dudes like me that
18 are doing two years, that dumb ass shank that you
19 found in my cell, that's not going to happen. I'm
20 trying to go home"; correct?

21 A. Correct.

22 Q. And, in fact, if an inmate is found in
23 possession of a shank, he would get into trouble;
24 correct?

25 A. I don't work for the Department of

1 Corrections, but I would assume, yes.

2 Q. In fact, it's a crime for someone who is
3 incarcerated to have a weapon like a shank?

4 A. Yes.

5 Q. And if someone were to threaten the life of
6 a correctional officer, that would also get them into
7 trouble; correct?

8 A. That's correct.

9 Q. It may also be a crime; correct?

10 A. Correct.

11 Q. Now, we talked a little bit about the
12 letter that Eric Duran wrote to Mr. Sapien. At some
13 point, did the STIU provide you with a list of SNM
14 members during that meeting?

15 A. I don't recall that.

16 Q. So I will turn you to page 31528. And this
17 is where you're discussing with Mr. Duran alleged
18 members of the SNM. And so in the middle of the page
19 Sergio -- and again, that's Sergio Sapien -- says,
20 "Here's what I got. I did this last week. It has
21 names, numbers, and all that good stuff in there."

22 And Katy" -- that would be you; correct?

23 A. Correct.

24 Q. You respond, "Okay, is that an updated one
25 you said?" Do you recall receiving that list of

1 names and numbers?

2 A. I do recall getting a list from him. I
3 don't know if I received it during that interview.
4 But as I said, I was working on a prison initiative
5 that we were keeping track of the different gang
6 members, and seeing which ones were causing problems
7 in the prison.

8 Q. So if you received a list like that, what
9 would you have done with it?

10 A. I would have kept it probably in my working
11 file, or possibly put it into the case.

12 Q. Okay. Do you recall if you did that in
13 this instance?

14 A. I don't recall.

15 Q. During the conversation with Mr. Sapien --
16 again, let's see if I can -- now, looking at Bates
17 31529. And on this page at the very top you'll see
18 Eugene asks, "Is that in your packet, sir?"

19 And Mr. Sapien responds, "Yes, sir";
20 correct?

21 A. Yes.

22 Q. What was that packet?

23 A. Again, that was the list that he
24 provided -- he gave a copy to Eugene, and I believe
25 Eric also received a copy -- of the different inmates

1 that were possibly in the gang.

2 Q. Were there any other documents in that
3 packet, to your recollection?

4 A. Not that I recall.

5 Q. And is that packet something that you would
6 have put into the case file?

7 A. Again, that's Eugene's packet that he's
8 referring to there. So I would assume it probably
9 would be a similar list that I received.

10 Q. In preparing to testify today, did you
11 listen to the recording of the February 2015
12 interview with Eric Duran?

13 A. I did not. I just reviewed the transcript.

14 Q. During the interview with him, you did
15 discuss Sergeant Artiaga; correct?

16 A. I believe so.

17 Q. What do you recall about that conversation?

18 A. I would have to refer to the transcript. I
19 can't recall at this time.

20 Q. Well, unfortunately -- I can show you this
21 transcript, but would you accept a representation
22 from me that the portion of the discussion about Mr.
23 Artiaga is not in this transcript? Would you like to
24 see the transcript?

25 A. If you're going to need to question me on

1 something, I'd have to see it to refresh my memory.

2 Q. I'm about to question you about the
3 conversation regarding Sergeant Artiaga, but it's not
4 included in this transcript.

5 A. I just reviewed the transcript. I did not
6 listen to the audio.

7 Q. When you reviewed the transcript, do you
8 remember seeing anything about Sergeant Artiaga?

9 A. No.

10 Q. You testified on direct that Mr. Duran was
11 the first one to raise -- to assert that Anthony Ray
12 Baca called the Molina hit; correct?

13 A. From my knowledge, yes.

14 Q. And I'm looking on page 31526. In fact, it
15 was Eugene who first identifies Mr. Baca as the
16 person who called it; correct?

17 A. I'm assuming, from looking at that page
18 that you're putting up.

19 Q. I'm asking you about the recording itself.
20 Who made this recording?

21 A. I believe that was Chris Cupit.

22 Q. And what do you recall about the
23 conversation prior to the recording starting?

24 A. The conversation prior was just kind of
25 smalltalk, you know, talking about him. I believe we

1 had brought him a breakfast burrito, or something
2 like that. So it was nonrelevant to any of the
3 ongoing investigations.

4 Q. Did you take any notes of the conversation
5 that happened before the recording started?

6 A. I may have, if it was anything relevant.
7 But I don't think -- they started the recording as
8 soon as we started the actual interview.

9 Q. And do you have notes from your meeting
10 with Mr. Duran?

11 A. I do not have them with me. They are in
12 our Albuquerque office.

13 Q. And would you be willing to review those
14 notes to see if any of them pertain to conversation
15 before the recording?

16 A. Yes, I'd have to see what time the
17 recording was started. And I'd have to listen to the
18 recording to see.

19 Q. And you wrote some reports in this case;
20 correct?

21 A. Correct.

22 Q. And so let me ask you this: So, when you
23 wrote those reports, did you rely on your notes or
24 did you just rely on your recollection of the
25 meeting?

1 A. On the notes also.

2 Q. And have you compared your notes to the
3 report to see if there is anything in the notes that
4 are not in the report?

5 A. Not since I've written the report. But I
6 usually do compare it before I submit the report.

7 Q. Can you conduct that review as well when
8 you return to your office?

9 A. Yes.

10 Q. And if you have this packet that was
11 provided to you by STIU, would you be willing to
12 produce that in this case?

13 A. Yes.

14 Q. Would you also be willing to produce your
15 notes?

16 A. Yes.

17 Q. You testified on direct quite a bit about
18 the information that Eric Duran provided about the
19 Molina homicide. You are aware that Mr. Duran was
20 not in Southern New Mexico Correctional Facility at
21 the time of the homicide; correct?

22 A. That's correct.

23 Q. He was in PNM North?

24 A. Yes.

25 Q. And the information that he provided you

1 was information he'd obtained from Jerry Armenta;
2 correct?

3 A. I believe so.

4 Q. And during the interview with you, he was
5 negotiating -- not negotiating, but speaking to the
6 Government about a plea deal for Mr. Armenta;
7 correct?

8 A. He was not speaking for a plea deal for
9 Armenta. But he was -- he did feel bad because he
10 felt like he had been kind of set up. He was 30 days
11 left before he was released, and he indicated that he
12 was forced to participate in the murder. And he felt
13 bad for him.

14 Q. And he suggested to you that 10 years was a
15 good sentence for Mr. Armenta based on the Molina
16 homicide?

17 A. Well, he did say that -- you know, he did
18 the crime, he would have to do the time, you know, he
19 did participate in it. But he also felt like he had
20 no choice; that he was forced.

21 Q. Are you aware that at a disciplinary
22 hearing following Mr. Duran's threatening an
23 officer's life that he called Jerry Armenta as a
24 witness?

25 A. I'm not aware of the hearings conducted by

1 DOC.

2 Q. Are you aware that Mr. Duran would call
3 Jerry Armenta as a witness to defend him against any
4 kind of allegations?

5 A. I was not aware of that.

6 Q. And Mr. Duran also offered to bring Mr.
7 Armenta in to talk to the FBI; correct?

8 A. Well, he personally could not bring him in.
9 But he had talked to him and tried to get him to
10 cooperate.

11 Q. You testified on direct that "Pup" had made
12 a threat -- or sorry, Anthony Ray Baca, had made a
13 threat, or that Eric Duran explained that Anthony Ray
14 Baca had made a threat against both Gregg Marcantel
15 and Dwayne Santistevan; correct?

16 A. Yes.

17 Q. I'd like to show you page 31541 of the
18 transcript. And this is the portion of the
19 transcript where they're talking about Dwayne
20 Santistevan and Gregg Marcantel; correct?

21 A. That's correct.

22 Q. And Eugene says, "So 'Pup' was the one
23 calling the shots?"

24 And Eric Duran said, "He probably hates him
25 more than Marcantel"; correct?

1 A. Correct.

2 Q. And by "him" he means Dwayne Santistevan?

3 A. That's correct.

4 Q. And you asked, "And Marcantel or the hit
5 was only on Santistevan?"

6 And Mr. Duran replied, "No, no, it was only
7 on Santistevan. But I'm saying he hates Santistevan
8 more than he hate Marcantel"; correct?

9 A. Yes.

10 Q. So he's reporting only that there was a
11 potential threat against Mr. Santistevan?

12 A. That's correct.

13 Q. Do you know if anyone other than STIU
14 recorded that interview?

15 A. No, nobody else did.

16 Q. We talked before about Mr. Eric Duran
17 telling you that he was cooperating to give back to
18 the community, not because he was in trouble. But
19 later on in this conversation Mr. Duran also
20 indicated that he wanted some benefits for
21 cooperating; correct?

22 A. Yes.

23 Q. For example, he was looking for lump sum
24 credit to get out of prison early?

25 A. That was not brought up at that time, no.

1 Q. And when you testified about Mr. Duran
2 wanting to seem like he was still in trouble so to
3 keep away some of his privileges, you're aware he was
4 in prehearing isolation because of a disciplinary
5 infraction at that time; correct?

6 A. I believe all of SNM was in lockdown at
7 that time, not just him.

8 Q. Did you understand -- well, I guess you'd
9 testified before you weren't aware that he was found
10 with a shank?

11 A. That's correct.

12 Q. And put into prehearing detention for that?

13 A. That's correct.

14 Q. So his privileges had been taken away, he
15 was actually negotiating for things to be given back?

16 A. He was hoping by his cooperation he would
17 be able to have some of his personal items returned.

18 Q. After you met with Mr. Duran on the 19th of
19 February, when did you next speak to him?

20 A. It would have been in March, somewhere
21 around the 25th, I believe, or something like that.

22 Q. And was that the meeting you discussed
23 earlier where you gave him the admonishments and the
24 recording device?

25 A. That's correct.

1 Q. Did you record that interview with
2 Mr. Duran?

3 A. I did not.

4 Q. Did you take any notes of that interview?

5 A. I believe a report was written up, yes.

6 Q. And would you be willing to check your file
7 for any notes that you might have made from March of
8 2015?

9 A. Yes.

10 Q. And to produce them?

11 A. Yes.

12 Q. Thank you.

13 After you met with Mr. Duran, in March of
14 2015 -- so other than admonishments that you gave him
15 and giving him the recording device, did you discuss
16 anything else?

17 A. There was other interviews with him. I
18 would have to look at my notes and my papers to see
19 exactly what was discussed on what days. But we did
20 discuss other criminal activity on other interviews.

21 Q. How many interviews, total, did you
22 participate in with Mr. Duran?

23 A. It was very few, because I was only his
24 handler for a couple of months. So two to three.

25 Q. And would you have generated a report

1 following each interview?

2 A. Yes.

3 Q. Who was present during your meetings with
4 Mr. Duran?

5 A. Again, to be exact, who was at every
6 meeting, I'd have to look at my reports. But we
7 would have always had STIU officers present, because
8 they would have transported him to wherever we were
9 meeting. It would have been Captain Sapien, it would
10 have been Investigator Cupit, possibly Escare Loyola
11 (phonetic) that worked with them. And then I also
12 had several task force officers that were involved in
13 it.

14 Q. So at some point during the interview, Mr.
15 Sapien indicates he'd interviewed Duran the week
16 before your interview with him; correct?

17 A. Yes, at some point before.

18 Q. Were you ever given a report or a recording
19 of that interview?

20 A. No.

21 Q. You testified that you handed over
22 Mr. Duran to another handler, Bryan Acee?

23 A. That's correct.

24 Q. When did that happen?

25 A. That was early August.

1 Q. How many times -- you gave the recording
2 device to Mr. Duran in March of 2015?

3 A. Correct.

4 Q. Are there any other instances where you
5 provided him with a recording device?

6 A. Well, the recording device was switched out
7 occasionally. But during the time that I had him, I
8 think we attempted to give two different recording
9 devices.

10 Q. And would you meet with him when you would
11 switch out recording devices?

12 A. Captain Sapien would do that, so it wasn't
13 as obvious with me going in and out of the prisons.

14 MS. DUNCAN: Your Honor, if I could just
15 have a moment?

16 THE COURT: You may.

17 MS. DUNCAN: I just have one final
18 question.

19 Q. When we were talking about your notes, has
20 anyone from the U.S. Attorney's Office ever asked to
21 review your notes?

22 A. They just referenced my notes yesterday
23 while I was up here.

24 Q. That was the first time?

25 A. Yes.

1 MS. DUNCAN: Thank you. No further
2 questions, Your Honor.

3 THE COURT: Thank you, Ms. Duncan.

4 Do any of the other defendants have any
5 cross-examination of Ms. Brusuelas? All right. Ms.
6 Sirignano?

7 MS. SIRIGNANO: Yes, Your Honor.

8 THE COURT: All right. Ms. Sirignano.

9 MS. SIRIGNANO: Thank you, Your Honor.

10 EXAMINATION

11 BY MS. SIRIGNANO:

12 Q. Good morning, Agent.

13 A. Good morning.

14 Q. You talked about the documents that you had
15 Mr. Duran sign when you opened him during direct
16 examination; correct?

17 A. About the admonishments?

18 Q. Yes.

19 A. Yes.

20 Q. What kind of admonishments were they?

21 A. Do you need me to repeat them, the ones I
22 gave, the summary of them?

23 Q. Please.

24 A. Okay. We would have informed him that all
25 the information he's giving is voluntary. He must be

1 truthful. That he needs to follow any direction that
2 we give him. We would try to protect his identity.
3 We also give a section of admonishments where we tell
4 him he's not an employee of the U.S. Government. He
5 cannot sign any contracts on behalf of the U.S.
6 Government. He cannot do any work for the U.S.
7 Government without preapproval from us. We inform
8 him that we are not making any promises about lack of
9 prosecution, or if we're going to make any payments
10 to him. But if we do make payments to him, he'll
11 have to pay taxes, that's his responsibility.

12 Q. And was there a form or a checklist that
13 you used to make these admonishments?

14 A. Yes, there is a form.

15 Q. And that form goes in his informant file;
16 correct?

17 A. Yes.

18 Q. And he has an informant file?

19 A. Yes, he does.

20 Q. Have you produced the informant file to the
21 Government?

22 A. I have not.

23 Q. Can you bring it to us so we can use that
24 in your cross-examination today?

25 MR. CASTELLANO: Your Honor, my

1 understanding is that that file is already on the way
2 to the defense for production, so that is being
3 produced, and I think that includes the
4 admonishments. So I just want to shortcut that.

5 THE COURT: All right.

6 MS. SIRIGNANO: Your Honor, we need this
7 informant file to cross-examine this witness
8 properly. She opened up Mr. Duran, and we need to
9 make sure that everything was done properly according
10 to FBI procedure.

11 THE COURT: Well, it doesn't look like
12 we're going to get them today. So you'll have to --

13 MS. SIRIGNANO: Can I request that this
14 witness be re-called once we get these documents?

15 THE COURT: Well, I don't know. I don't
16 think they're going to probably have much impact on
17 my decision. So if you want to re-call her, you can.
18 But I haven't heard much to suggest that Mr. Duran
19 did anything involuntary here.

20 MR. CASTELLANO: And I would object for
21 that reason, Your Honor, that there is no indication
22 the admonishments would affect the coercion which is
23 at play here.

24 MS. SIRIGNANO: May I continue, Your Honor?

25 THE COURT: You may.

1 MS. SIRIGNANO: Thank you.

2 Q. So you were the one that opened up
3 Mr. Duran; correct?

4 A. Yes, ma'am.

5 Q. Okay. And during that process, you run a
6 criminal history check; correct?

7 A. That's correct.

8 Q. Did you find a warrant from another
9 jurisdiction during that check?

10 A. I would have to review his opening
11 documents.

12 Q. Was that a yes or a no?

13 A. I do not recall at this time.

14 Q. If you did find a warrant when you opened
15 him up, what's the normal FBI procedure for dealing
16 with that warrant?

17 A. We make sure they take care of the
18 warrants. At the time I opened him up, he was
19 already incarcerated, though.

20 Q. What was he incarcerated for? Murder?

21 A. I think he was still doing time on a
22 murder, yes.

23 Q. First degree murder?

24 A. I don't recall exactly. I'd have to look
25 at the file.

1 Q. When was the last time you spoke to
2 Mr. Duran?

3 A. Sometime in 2015.

4 Q. Was this after you handed him off to Mr.
5 Acee?

6 A. No, I did not speak to him after that.

7 Q. Did you assist in his apprehension since he
8 recently fled from contact with the FBI and the
9 jurisdiction?

10 A. I did not.

11 Q. Do you know where he was arrested?

12 THE REPORTER: Where or when?

13 MR. CASTELLANO: Objection, Your Honor.

14 Q. Do you know where he was arrested?

15 THE COURT: Sustained.

16 A. I was not involved in that investigation.

17 MS. SIRIGNANO: May I have a moment, Your
18 Honor?

19 THE COURT: You may.

20 MS. SIRIGNANO: Pass the witness, Your
21 Honor.

22 THE COURT: Thank you, Ms. Sirignano.

23 Any other defendant have questions?

24 MS. JACKS: I have a few questions.

25 THE COURT: Ms. Jacks.

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EXAMINATION

BY MS. JACKS:

Q. Good morning, Agent Brusuelas. How are you?

A. Good morning.

Q. I want to just talk generally about what your state of mind was when you first interviewed Eric Duran. Did you know what kind of prior convictions he'd sustained?

A. Yes, I did. Before I interview anybody, I do run a criminal history on him.

Q. Do you remember any of that now?

A. I would have to review the file. I know he had an extensive criminal history. He's been in and out of jail the majority of his life. He was convicted of murder, and has several drug charges, but I could not be exact right now.

Q. Was it your state of mind, when you first went in to interview him, that he was potentially a very manipulative individual?

MR. CASTELLANO: Objection, Your Honor. To relevance. I don't know what it has to do with coercion.

THE COURT: Well, I can see a little bit of the argument. Overruled.

1 A. Every time I interview somebody who is
2 incarcerated, or who is willing to cooperate, I
3 always take what they say -- I verify information and
4 stuff, because a lot of times they are trying to get
5 something for their cooperation.

6 Q. And I think what you said when Mr.
7 Castellano was asking you questions was that one of
8 the things that Mr. Duran emphasized to you in this
9 first meeting with you was that he was actually just
10 doing all this out of the goodness of his heart, and
11 didn't want anything?

12 A. Yes, fairly much. So he said that he was
13 trying to give back to the community. It was time
14 that he came forward as part of his rehabilitation,
15 yes.

16 Q. And during the course of the conversation
17 with him, it's actually a topic he went back to on
18 several occasions, in an effort to almost reassure
19 you that that was his motivation?

20 A. That's correct.

21 Q. During the conversation, did you start to
22 hear things that maybe caused you to question his
23 stated motive for coming forward?

24 A. No.

25 Q. So after the first meeting with Mr. Duran,

1 it was your state of mind, or your belief that it
2 really was true that he was just coming forward out
3 of his genuine effort to want to change, and not for
4 any sort of benefits?

5 A. Well, I don't think that's 100 percent of
6 the reason he came forward, no. I mean, he did
7 mention that he was hoping to get commissary back.
8 So, no, I don't think it was 100 percent of his
9 intention.

10 Q. So after your first interview with
11 Mr. Duran, you had some reason to believe that
12 perhaps he was trying to manipulate you?

13 A. I don't believe he was trying to manipulate
14 me.

15 Q. Did you make -- let me just go back. If
16 Mr. Duran's motive in coming forward wasn't just out
17 of his genuine desire to change his life, did he lie
18 to you during that interview?

19 A. Not that I'm aware of.

20 THE COURT: Well, and let's ask it in those
21 terms. I think I'm going to be the one that has to
22 determine whether people are lying or not. So let's
23 make sure, as we get ready for trial, that we don't
24 ask questions like that. I, or the fact finder will
25 make those determinations. Let's not be asking

1 witnesses those.

2 Q. Well, let me see if I can ask it in a
3 different way that maybe is not objectionable.

4 One of the things that you said you
5 explained to Mr. Duran is that, if he was going to
6 work with you, he had to be truthful, right?

7 A. Correct.

8 Q. And was that qualified in any sort of way?
9 Like he only had to be 98 percent truthful? He could
10 lie about 2 percent of the things, and still work
11 with you?

12 A. We did not qualify that, no.

13 Q. So it's an unqualified truthfulness that's
14 part of the terms of his cooperation?

15 A. Correct.

16 Q. And what, if any, efforts did you make,
17 after speaking with him on two or three occasions, to
18 verify that he was, in fact, 100 percent truthful
19 with you?

20 A. I don't know if he was, in fact, 100
21 percent truthful. You know, we verified some of the
22 information he gave us, and it was truthful.

23 Q. As you sit here today as a witness, do you
24 have reason, or can you tell us anything that he was
25 untruthful about that could have potentially violated

1 his agreement to be a cooperating witness?

2 A. No, I cannot.

3 Q. You talked about Mr. Duran making some
4 statements about this homicide of an inmate named
5 Javier Molina. Do you recall that testimony?

6 A. Yes.

7 Q. And Mr. Duran didn't have any personal
8 knowledge of the murder of Javier Molina, did he?

9 A. He was not present at the time, no.

10 Q. So everything he was telling you was stuff
11 he heard from somebody else?

12 A. That's correct.

13 Q. And Ms. Duncan asked you some questions
14 about a list that may have been provided to you
15 regarding SNM Gang members. Do you recall those
16 questions?

17 A. Yes.

18 Q. And you also, if I'm correct, you recall
19 getting such a list?

20 A. I believe I did. I, several times, have
21 gotten lists from DOC about different things. So I
22 believe I did get a copy of that.

23 Q. And it sounds like from your testimony, you
24 may have gotten lists like that on a number of
25 occasions?

1 A. Yes, on different things.

2 Q. And those lists, would they be in
3 Mr. Duran's informant file, or do you know where they
4 are today?

5 A. As I testified to a little bit ago, I'm not
6 sure. They might be in my notes in his file.

7 Q. Do you know if Daniel Sanchez was on any of
8 those lists?

9 A. I don't recall the list, so I could not
10 say.

11 Q. As part of your training in becoming an FBI
12 agent, you're trained on your duty to preserve
13 evidence that might benefit a criminal defendant,
14 aren't you?

15 A. That's correct.

16 Q. You have a duty to preserve potentially
17 exculpatory evidence?

18 A. That's correct.

19 Q. And, if Mr. Sanchez' name was not on a list
20 of SNM members that was provided to you in 2015, that
21 could be potentially exculpatory to him, wouldn't you
22 agree?

23 A. It wasn't an all-inclusive list.

24 Q. Wouldn't you agree that it's potentially
25 exculpatory? If somebody's name is not on a list of

1 SNM Gang members, that might be something that would
2 be beneficial to them in a subsequent prosecution?

3 A. Potentially.

4 Q. And so what do you with that potentially
5 exculpatory evidence?

6 A. At the time I received the list, as I
7 explained earlier, I had been assigned to work a new
8 initiative in the prisons. And every bit of
9 information that I received from them was not
10 information that went towards an ongoing case. So
11 some of it was just information for background, for
12 my information. I didn't save every bit of
13 information on every individual that I received
14 during that period.

15 Q. So is there an exception to your duty to
16 preserve exculpatory information that says that if a
17 person isn't charged, or isn't the subject of a
18 pending indictment, that you don't need to preserve
19 it?

20 A. If it's not information that's relevant to
21 an ongoing case, I did not save it.

22 MS. JACKS: I have nothing further.

23 THE COURT: Thank you, Ms. Jacks.

24 Any other defendants have cross-examination
25 of Ms. Brusuelas?

1 All right. Mr. Castellano, do you have
2 redirect of Ms. Brusuelas?

3 MR. CASTELLANO: No redirect, Your Honor.

4 THE COURT: All right. You may step down,
5 Ms. Brusuelas. Is there any reason that Ms.
6 Brusuelas cannot be excused from the proceedings?
7 Mr. Castellano?

8 MR. CASTELLANO: No, Your Honor.

9 THE COURT: From the defendants?

10 MS. SIRIGNANO: Your Honor, I'd just like
11 to renew my objection to not having the file. And
12 once we receive it, I will advise the Court if we
13 need to re-call her.

14 THE COURT: All right. Well, you'll need
15 to step outside at least for the remainder of this
16 hearing. And we'll discuss whether you'll be
17 re-called. But at least you can't stay within the
18 confines of the courtroom. Thank you for your
19 testimony.

20 MR. CASTELLANO: Can I get some
21 clarification on that? Is Ms. Sirignano going to
22 review -- I think she's going to review the notes on
23 a different date, so we could dismiss Agent Brusuelas
24 today.

25 THE COURT: Well, she's free to go back to

1 Albuquerque, correct, because you're not going to be
2 able to see the notes today, correct, Ms. Sirignano?

3 MS. SIRIGNANO: That's correct, Your Honor.

4 THE COURT: But she's reserving the right
5 to re-call. I'm not ruling on it, and Ms. Sirignano,
6 I don't think is committed yet to calling her back.
7 So we'll see how it develops.

8 MR. CASTELLANO: Understood, Your Honor. I
9 just want to make sure that she can leave for today.

10 THE COURT: She can leave for today, but
11 she can't stay in the courtroom because she may be
12 subject to re-call down the road. All right. Thank
13 you for your testimony.

14 All right. Does the Government have its
15 next witness or evidence on the motion to suppress?
16 Mr. Castellano? Mr. Beck?

17 MR. CASTELLANO: May I have a moment, Your
18 Honor?

19 THE COURT: You may.

20 MR. BECK: Your Honor, I guess we were
21 under the understanding that we would go back to the
22 motion -- to the other motions we were discussing
23 yesterday after this.

24 THE COURT: Okay.

25 MR. BECK: I think we were asking to take

1 her out of order, just since she was here, to get her
2 back to Albuquerque.

3 MS. DUNCAN: That was my understanding as
4 well, Your Honor.

5 THE COURT: All right. So then I think we
6 were discussing Carlos Herrera's motion in limine.
7 And I think y'all were going to maybe look at some
8 stuff overnight, maybe talk to each other, and maybe
9 y'all could tell me where you are. Otherwise, I'll
10 start making some rulings here.

11 Mr. Castellano.

12 MR. CASTELLANO: Unfortunately, I don't
13 know that we got very far. We got into the evening,
14 and then everybody left. Ms. Bhalla and I discussed
15 this for a little bit, but I don't know that we got
16 much further. And because of the lateness of the
17 conclusion of the proceedings, I haven't had a chance
18 to look at the substantiating documents underlying
19 each of them.

20 But what I told Ms. Bhalla was, generally
21 speaking, if Mr. Herrera is in prison, and it
22 involves drugs, I would likely move its admission.
23 Because as I ended the day yesterday, stating that
24 Mr. Herrera was -- his brother and father were SNM
25 Gang members, and his mother would sell drugs both to

1 18th Street and the SNM Gang members. So that would
2 be relevant to us.

3 THE COURT: Let me attempt to see if I can
4 maybe make some progress on this, and see what people
5 think. We've already struck the first three on page
6 1. I'm not seeing that any of those others relate to
7 drugs or that they are an overt act.

8 And on the second page, the event on
9 January 26, 1997, keep it on the table. The next one
10 on September 14, leave it on the table. We've
11 already -- I'm not saying everybody is agreed, but at
12 least we discussed leaving the next two on the table.
13 Keeping the May 24 on the table. We struck the next
14 two, November 3 and September 8, 2000.

15 MS. BHALLA: I'm sorry. I lost you after
16 May 24, 1999, I'm sorry.

17 THE COURT: Keep May 24, 1999 on the table.
18 And then we struck November 3, 1999 and September 8,
19 2000. Leave on the table January 5, 2001, the
20 portion at least about -- I'll just say the portion
21 about heroin I'll take off the table. And this is
22 just me for the present time of putting something
23 together. So we'll take -- we'll put a period after
24 heroin.

25 On page 3, leave on the table January 12.

1 MS. BHALLA: Of '02?

2 THE COURT: 2002. I'm sorry.

3 MS. BHALLA: No, that's okay. Thank you.

4 THE COURT: Leave on the table December 23,
5 2019 (sic).

6 MS. BHALLA: Do you mean 2010?

7 THE COURT: 2010, correct.

8 Leave on the table February 1, 2011. We've
9 already struck October 6, 2011. Leave on the table
10 October 18, 2011.

11 (Mr. Adams left the courtroom.)

12 THE COURT: Here's what I would propose to
13 do, since we don't have any of these as overt acts
14 pled in the indictment, so that the chances are less
15 that any of these are going to be relevant to the
16 enterprise, or to furthering the enterprise. The
17 ones I have identified as still on the table, then
18 those are ones that for the present time the
19 Government will need to inform, on January 22,
20 whether they -- whatever information they have that
21 they're going to use to establish relevancy. All the
22 others will be off the table. If the Government
23 wants to put them back on, it needs to put them back
24 on by that date. There will be no 404(b), so it will
25 have to be tied to the relevancy. And then some of

1 these we permanently struck. And we confirmed that
2 on the record yesterday.

3 Could you live with that procedure, Mr.
4 Castellano?

5 MR. CASTELLANO: Yes, Your Honor. And I'll
6 double-check with Ms. Bhalla on the list of the
7 things that are still on the table. But for now, the
8 answer is yes.

9 THE COURT: All right. Do you want me to
10 go back through what's on the table so it's clear?

11 MR. CASTELLANO: Would you please. I would
12 appreciate that.

13 THE COURT: All right. So what's
14 permanently off the table is the first three on page
15 1. And what is not permanently off the table, but
16 it's off the table for the present time is -- well,
17 the September 24, 1991, November 16, 1991, and
18 January 12, 1994 are permanently off the table. The
19 rest is off the table, but the Government can put it
20 on by January 22.

21 On page 2, the first four are in the same
22 category. They're off the table unless the
23 Government puts them back on. January 26, 1997 is
24 still on the table. July 27, 1997 is off the table,
25 but it can be put back on by January 22. September

1 14, 1997 is on the table. The next one is on the
2 table, the 1998, voting for Martinez. The February
3 23 is on the table. The May 24, 1999 is on the
4 table. Off the table, but could be put back on is
5 the July 31. Permanently off the table is the
6 November 3, 1999, September 8, 2000. The first
7 clause down to heroin is on the table. January 16,
8 2001 and the January 31, 2001, at the bottom of page
9 2, are off the table unless the Government puts them
10 back by January 22. January 12, 2002 is on the
11 table.

12 The next seven lines, which will go through
13 October 9, 2010, are off the table unless the
14 Government, by January 22, puts them back on the
15 table with the information that we've indicated. The
16 December 23, 2010 is on the table. The February 1,
17 2011 is on the table. The October 6, 2011 is
18 permanently off the table. October 18, 2011 is on
19 the table. The next one, on March 2017, is off the
20 table unless the Government, by January 22, puts it
21 back on the table, and indicates what it's going to
22 use to tie it to the enterprise, proving the
23 enterprise, or the furtherance of the enterprise.

24 Is that clear, Mr. Castellano?

25 MR. CASTELLANO: It is, Your Honor. Thank

1 you.

2 THE COURT: Ms. Bhalla, is that clear?

3 MS. BHALLA: Yes, Your Honor. If the Court
4 would -- just a question for the Court. Are the ones
5 that are sort of off the table now, but could be back
6 on the table, is that sort of an indication that the
7 Court expects a little bit from the Government in
8 terms of putting it back on the table again?

9 THE COURT: Well, I mean, we're dealing
10 with a lot of subjects without any documents. You've
11 looked at some. And so that's the reason I've been
12 pushing the Government here, because you did your
13 homework. They may just decide it's not worth
14 looking at the documents. If they are, they're gone.
15 So we're getting some rulings here. If they decide
16 to put them back on, they're going to have to do the
17 same thing with the ones on the table and that's give
18 you information so that you can make an informed
19 judgment as to whether they're relevant to
20 establishing enterprise, or that they were in
21 furtherance of the enterprises activities.

22 MS. BHALLA: Okay. Thank you, Your Honor.

23 THE COURT: All right. Everybody live with
24 that? All right. That's what we'll do on Mr.
25 Herrera's bad acts for the present time.

1 All right. Then we will now take up
2 Document 1555, which is Christopher Garcia's motion
3 on bad acts. Do you want to make any preliminary
4 statements, Ms. Sirignano, Mr. Adams, on your motion?

5 MS. SIRIGNANO: Good morning, Your Honor.
6 Mr. Adams had to depart. He's on the phone, though,
7 or should be momentarily.

8 THE COURT: All right.

9 MS. SIRIGNANO: Your Honor, at this point
10 in time, these are alleged bad acts. There is 40 of
11 them here. And a few of them are res gestae acts, I
12 believe. But we do not concede that any of these
13 should be used at trial. They're highly prejudicial.
14 And a majority of these are from their snitch, Mario
15 Montoya, that perhaps might have gone before the
16 Grand Jury. I don't know, specifically from him or
17 by a summary agent, which would make them hearsay
18 statements. But every single one of these 40 are
19 overt Acts in the 16-CR-1613 case, but for number 2,
20 I believe. So at this point in time I don't have any
21 evidence, other than the indictment in 1613,
22 specifically, that ties this in to the SNM
23 enterprise. And as I said as I started, there are
24 alleged, and some of them are prior convictions, but
25 our position is that none of them have anything to do

1 with the SNM Gang.

2 Thank you, Judge.

3 THE COURT: Thank you, Ms. Sirignano.

4 So if I understand from Ms. Sirignano's
5 comments, everything except the May 16 -- and I
6 believe that's supposed to be 1995 -- incident there,
7 the second one, are pled as overt acts in the
8 indictment?

9 MR. CASTELLANO: Yes, Your Honor.

10 THE COURT: All right. Do you want to put
11 your chart up, if you prepared one, and I'll write
12 that down.

13 MR. CASTELLANO: And I'll check the second
14 page as the Court is looking at the notes.

15 THE COURT: All right. Do you want to turn
16 the page, Mr. Castellano?

17 MR. CASTELLANO: Yes, Your Honor.

18 THE COURT: On that 2015, where he received
19 \$100, where he wired 100 to Mr. Archuleta, is that OA
20 193?

21 MR. CASTELLANO: Yes, it looks like 193.

22 MS. SIRIGNANO: I'm sorry, Your Honor. I
23 didn't hear you.

24 THE COURT: I was asking whether the wiring
25 in 2015, to Mr. Archuleta, is that OA 193. And he

1 confirmed it was?

2 MR. CASTELLANO: It is, Your Honor. It's
3 Overt Act 193.

4 THE COURT: All right. If I could see page
5 3 of your letter, Ms. Armijo's letter.

6 And you've got written at the top, "15-4275
7 pled guilty."

8 MR. CASTELLANO: Yes, Your Honor. What
9 I've done is, in 15-4275, Mr. Garcia pled guilty to,
10 I believe, four counts involving trafficking of
11 narcotics. And I can put that up next.

12 THE COURT: That was our drug case that was
13 settled?

14 MR. CASTELLANO: Yes, it was.

15 MS. SIRIGNANO: And, for the record, Your
16 Honor, the factual basis in that drug case, we did
17 not plead to drug trafficking on behalf of the SNM.
18 So I would object strenuously to any of that coming
19 in as a bad act in this case.

20 THE COURT: Well, I'm sure you have
21 evidence that will supplement what Mr. Garcia pled
22 to, Mr. Castellano?

23 MR. CASTELLANO: That's correct, Your
24 Honor.

25 THE COURT: All right. If I can look at

1 your overt acts on page 4.

2 All right. I assume that -- well, I don't
3 want to assume anything, but I'd asked, on others,
4 you will not attempt to get any of these that have
5 been marked as overt acts, you'll not attempt to get
6 any of those in through 404(b), by pointing to some
7 legitimate purpose? You'll simply take the position
8 that these are relevant to proving enterprise and
9 proving that they're in furtherance of the
10 enterprise's activities?

11 MR. CASTELLANO: That's correct, Your
12 Honor.

13 THE COURT: Let's talk a second about the
14 May 16, 1995. Are you going to attempt to bring that
15 in to trial?

16 MR. CASTELLANO: It depends on what we have
17 for the substantiating documentation. If it's a
18 conviction, and we can tie that to SNM, then the
19 answer would be yes.

20 MS. SIRIGNANO: Your Honor, this is what
21 we're doing here today. I need to know one way or
22 the other.

23 THE COURT: Let me take them in order.
24 I'll talk to Mr. Castellano, and then I'll let you
25 have rebuttal.

1 MS. SIRIGNANO: Thank you, Judge.

2 THE COURT: All right. Anything else you
3 want to say on the motion, Mr. Castellano?

4 MR. CASTELLANO: Not at this time, Your
5 Honor.

6 THE COURT: If I were to require what I
7 have required of the other defendants that are going
8 to trial on their bad acts, they're really not bad
9 acts anymore; they're just evidence that the
10 Government intends to put on as far as whether it's
11 relevant to, or to try to establish enterprise or a
12 furtherance.

13 Would you be in agreement as to Mr. Garcia,
14 that you'll look at this list, including the May 16,
15 1995 incident, and by January 22, provide the
16 evidence you're going to rely upon to establish and
17 prove that these are related to the establishment of
18 the enterprise and in furtherance of the enterprise
19 activity?

20 MR. CASTELLANO: Yes, Your Honor. And just
21 looking at this quickly, at least the third page of
22 the document I have here is actually relevant. It's
23 evidence that we have to prove at the upcoming trial.
24 So they include the Gregg Marcantel conspiracy. So
25 when it talks about going on a mission, using coded

1 language regarding firearms, giving Mandel Lon Parker
2 a hotshot after the murder, all that is part of the
3 evidence in this case. So we'll be using all of
4 that. So we actually have to prove that.

5 MS. SIRIGNANO: Your Honor --

6 THE COURT: Hold on a second. Let me
7 finish up talking to Mr. Castellano, and then I'll
8 allow you to have rebuttal.

9 MS. SIRIGNANO: I apologize.

10 THE COURT: On that second one that we were
11 talking about, on the May 16, 1995, I think I asked
12 about the overt acts. But you'll not try to get that
13 into evidence under 404(b)? You'll also try to tie
14 that to proof of the enterprise and the enterprise's
15 ongoing activity?

16 MR. CASTELLANO: That's a good question,
17 Your Honor. That is actually one I could see being
18 used as 404(b). Because if the allegation is that
19 Mr. Garcia is not trafficking cocaine, or lacks
20 knowledge, then I think that actually could be used
21 as 404(b), to show lack of mistake, knowledge, and
22 intent, among other 404(b) factors. So I think that
23 one actually could be under 404(b).

24 THE COURT: So what would be the legitimate
25 purpose of the 404(b) evidence in this trial? What

1 would you be trying to establish in this case that
2 would be helpful to the jury?

3 MR. CASTELLANO: Basically, what I just
4 said. So if we put on other evidence that Mr. Garcia
5 had been trafficking in drugs, and then put on a
6 defense indicating that it wasn't him, or it was a
7 mistake, things of that nature, then I think we could
8 put that on to show lack of mistake, knowledge, and
9 intent indicating -- well, those 404(b) purposes.

10 In other words, if somebody was at a Border
11 Patrol checkpoint and they were denying knowledge of
12 the drugs in the vehicle, then we could put on
13 potentially a prior conviction.

14 THE COURT: Okay.

15 MR. CASTELLANO: Indicating that they did
16 have knowledge of the drugs in the vehicle. It would
17 be something to that effect.

18 THE COURT: You don't have to reveal any
19 sort of trial strategy, if you don't want to, but do
20 you intend to try to deny that Mr. Garcia used,
21 trafficked drugs, did that with other people?

22 MS. SIRIGNANO: Your Honor, Mr. Garcia is
23 not charged with drug trafficking in this case. He's
24 charged with being a felon in possession of a
25 firearm, a violation of 18 United States Code 924(c),

1 and the VICAR attempt to murder against Mr.
2 Marcantel. So if the Government wants to file a
3 404(b) motion to explain why it intends to bring in
4 my client's prior convictions from 1995 --

5 THE COURT: Well, I guess that's what
6 they've done with their letter. And almost all this
7 is not 404(b). But we may have one with this 1995,
8 that they're concerned that there may be -- that
9 Mr. Garcia may attempt to establish that any
10 connection he had with drugs was an accident or
11 misidentification, or something like that. So they
12 want this 404(b) evidence in the wings, in case he
13 doesn't.

14 If you don't want to tell me your strategy,
15 what I'd be inclined to do is we've identified this.
16 I'll just have to rule at the time, get a temperature
17 as to what your defense is through either your
18 cross-examination in the Government's case-in-chief,
19 or as you begin to put it on, they may be allowed to
20 put it on in rebuttal.

21 MS. SIRIGNANO: I understand what you're
22 saying, Judge. The Government's motion didn't
23 identify these as 404(b) specifically, and the
24 Government has yet to say other than mistake or
25 denial of -- it wasn't me, why they would be offering

1 it.

2 My point is, Judge, is that they are highly
3 prejudicial. They have nothing to do with the SNM,
4 and they occurred prior to when the Government
5 alleges that Mr. Garcia joined the SNM, which was
6 1999. So without revealing any trial strategy, I
7 understand what they're trying to do. I just think,
8 after a 403 balancing test, this conviction was
9 looked at by the Court in the drug case pursuant to a
10 609 motion. And the Court had ruled in that case
11 that the fact of the conviction, and not the actual
12 substance of the conviction, could be used if
13 Mr. Garcia took the stand.

14 So my position is, unless the Government
15 can show specifically under 404(b) why it wants to
16 enter this in as evidence, it's highly prejudicial
17 and should be excluded under a 403 balancing, Judge.

18 THE COURT: Mr. Castellano, do you have
19 anything further on your letter or this motion?

20 MR. CASTELLANO: Yes, Your Honor. In
21 response to Ms. Sirignano's point, in the drug case,
22 if you recall, the Government said it would not
23 present any racketeering evidence whatsoever in that
24 case. It was up to the defense whether they wanted
25 to open the door. So we were talking about a

1 different subject matter at that time.

2 The other thing about drug trafficking is
3 that the drug trafficking does affect interstate
4 commerce. So it's not only racketeering activity,
5 but it's also something that affects commerce. So
6 I'll get the Court thinking about this now.

7 Title 21, Section 801 -- I've highlighted
8 it. We're going to ask the Court at some point for
9 an instruction indicating that drug trafficking does
10 affect interstate or foreign commerce. That's a
11 finding by Congress. And I'll make it a little bit
12 bigger for the Court to see. So what Congress has
13 said that even -- sometimes, even when drug
14 trafficking is intrastate, it still has an effect on
15 interstate commerce. I've asked for that at least
16 once before, and was granted that, at least in the
17 Aryan Brotherhood trials. So I'll just put that on
18 the plate now, and the Court and parties can think
19 about that. But that is an instruction we will
20 request, and that meets at least two elements of the
21 offense in this case.

22 THE COURT: All right. Anything else on
23 this motion, Mr. Castellano?

24 MR. CASTELLANO: No, Your Honor.

25 THE COURT: All right. Anything further,

1 Ms. Sirignano, on this motion?

2 MS. SIRIGNANO: Yes, Your Honor. I'm still
3 unclear from the Government how they're going to try
4 and offer that first alleged bad act, whether or not
5 it's 404(b). And now Mr. Castellano is switching.

6 THE COURT: Do you mean the May 16, the
7 second bad act?

8 MS. SIRIGNANO: Well, I think he's
9 referring to -- May 16, yes, Your Honor, I'm sorry.
10 That's number 2. Either it's 404(b) or it's
11 enterprise --

12 THE COURT: No, he's saying he agrees that
13 he probably can't use that for enterprise. He's just
14 saying is if, particular to Mr. Garcia, if he comes
15 in at trial and suggests he's never used drugs, never
16 been in drug trafficking, then he'll use that to
17 establish that that is not the case. As he likened
18 it, it's like the tractor-trailer cases we have out
19 here. And that seems to me that that is a proper
20 purpose under 404(b). But it's kind of tied to what
21 the defense is.

22 MS. SIRIGNANO: Correct, Your Honor.

23 And I also understand from Mr. Castellano
24 that he's going to try and use these prior drug
25 convictions to satisfy his element under VICAR for

1 interstate commerce.

2 THE COURT: That's true, the other ones he
3 is.

4 MS. SIRIGNANO: Okay, Judge.

5 THE COURT: Have I captured your position?

6 MR. CASTELLANO: You have, Your Honor.

7 Regarding the May 16, 1995 conviction, I'm not sure I
8 can tie that in to the enterprise. If I can, I will.
9 And I'll submit supporting documentation to Ms.
10 Sirignano. But at this point, I think that is
11 404(b).

12 THE COURT: Okay.

13 MS. SIRIGNANO: We'll await the
14 documentation, Judge.

15 Judge, looking at that front page, please,
16 and it is number 5, counting down, "On or about
17 February 19, 2004, Christopher Garcia was shot by
18 rival gang member SD at the defendant's residence."
19 I don't understand how this could be a bad act. My
20 client was shot in the abdomen, and he still suffers
21 complications from that. This wasn't his action.
22 Someone shot him.

23 THE COURT: Well, you don't want it in the
24 trial, right?

25 MS. SIRIGNANO: It doesn't need to be in

1 the trial, Judge.

2 THE COURT: You don't want it in, right?

3 MS. SIRIGNANO: I do not.

4 THE COURT: So it's probably bad. It's a
5 bad act of somebody.

6 MS. SIRIGNANO: Well, how could him being
7 shot --

8 THE COURT: But I mean, I guess I've got to
9 be liberal to you. If you don't want it in, then --

10 MS. SIRIGNANO: The only reason why I don't
11 want it in is because I don't believe it's his
12 actions.

13 THE COURT: No, I think you want it out for
14 other reasons. You don't want the fact that
15 Mr. Garcia is in one gang, and he's being shot by
16 another gang? You don't want that in the trial.

17 MS. SIRIGNANO: My first argument, Judge,
18 would be that I don't understand how him being shot
19 is an alleged bad act on his part.

20 THE COURT: Well, then, I guess if you
21 don't think it's 404(b), then it can come in without
22 filtering it through this motion, then.

23 MS. SIRIGNANO: I'm sorry, Judge. I didn't
24 understand you.

25 THE COURT: Well, if you're saying it's not

1 404(b) evidence, because it doesn't pertain to him,
2 if you're making that argument, then I don't guess we
3 need to argue it here, because it will come in for
4 just general rules, 401.

5 MS. SIRIGNANO: I'm arguing that -- well,
6 it will come in as 401, yes, Judge. I'm arguing here
7 we're look at a summary of alleged bad acts that the
8 United States --

9 THE COURT: Well, I think we've noted that
10 the Government has been -- everybody has criticized
11 the overinclusiveness of this. I mean, if you don't
12 think it's 404(b), then that's fine, we'll just
13 analyze it as 401 evidence.

14 MS. SIRIGNANO: Thank you, Judge.

15 THE COURT: Anything else?

16 MS. SIRIGNANO: No, Your Honor.

17 THE COURT: All right. So then, as to all
18 the ones except the May 16, 1995, we'll just use the
19 same mechanism that we've had. I think the
20 Government has established, at least to the Court's
21 satisfaction, based largely on their representations,
22 that they have evidence that, for the present time,
23 I'm not going to exclude any of that on the basis of
24 relevance. None of that will come in under 404(b).
25 It will only come in if it's relevant to establishing

1 enterprise, or that the actions here were in
2 furtherance of the enterprise.

3 So the Government has agreed to -- so that
4 the defendants can make an informed decision -- has
5 agreed that it will, by January 22, indicate, A,
6 which ones they're going to advance. They may cut
7 some of them out. And then, secondly, what evidence
8 they have in support. So the defendants will then be
9 able to make a more informed relevancy objection.

10 Again, I'd hoped everybody would really
11 eyeball this, particularly on the defendants' side,
12 when they decide whether they're going to raise an
13 objection. Remember, it's a relevancy objection.
14 We're at a 401 on those. So chances are, if the
15 Government's evidence can -- has any tendency to
16 prove the enterprise, or that the actions were taken
17 in furtherance, it's going to come in. I'm not
18 making a determination whether it's by a
19 preponderance of the evidence or beyond a reasonable
20 doubt. It's simply a 401 standard. So be mindful of
21 that.

22 And then, as to the May 16, 1995 conduct,
23 for the present time, that is not going to be
24 relevant to establishing enterprise or the
25 furtherance of it. So the Government will have to

1 notice the Court and the defendants back up on that
2 if they're attempting to establish it's relevant. It
3 will just be 404(b). It will only come in to the
4 case if the defendant suggests, Mr. Garcia suggests,
5 either through cross-examination, that that's his
6 defense, or in his case-in-chief that he's raising
7 the defense that he never was around any drugs, never
8 used any drugs, didn't traffic in any drugs, didn't
9 conspire with anybody else to do it. If he stays
10 away from those defenses, either through
11 cross-examination or through his case-in-chief, then
12 that May 16 incident will not come in.

13 All right. Anything else on that motion,
14 the bad acts or 401 enterprise furtherance that we
15 need to discuss, Mr. Castellano?

16 MR. CASTELLANO: No, Your Honor.

17 THE COURT: Ms. Sirignano.

18 MS. SIRIGNANO: No, Your Honor. Thank you.

19 THE COURT: So that's how I'll rule on that
20 motion.

21 All right. My papers are messed up here,
22 because we kind of went back and forth and did some
23 different things, and I never had them all clipped
24 together, responses and things. But looking over
25 what Ms. Wild prepared as the clerk's minutes, which

1 was going to be prepopulated clerk's minutes, to help
2 Ms. Standridge follow what we were doing today.

3 It looks to me like we have completed the
4 work that I brought down just for this week. I know
5 we have a number of outstanding motions that we need
6 to continue. Does anybody know or see anything on
7 the packet that we -- oh, did I not do Mr. Perez'?
8 Did I skip over it somehow?

9 MR. CASTELLANO: You did, Your Honor.

10 MS. FOX-YOUNG: Yes, Your Honor, it was
11 filed a little bit later. So I think it's Document
12 1558.

13 THE COURT: Okay. So it just didn't make
14 the list.

15 MS. FOX-YOUNG: I think it made the list,
16 but somehow --

17 THE COURT: Ms. Wild's list, because I
18 stopped with 1555. So all right. Well, let's take
19 it up then.

20 MR. CASTELLANO: May we approach on that
21 one, Your Honor?

22 THE COURT: Approach the bench.

23 (The following proceedings were held at the
24 bench.)

25 MR. CASTELLANO: For each of these, I've

1 normally been putting the document on the visualizer.
2 On Mr. Perez, I'll just tell the Court which ones I
3 want to include, but there is a crime on here I'm
4 going to keep out from the rest of the group.

5 MS. FOX-YOUNG: Is there even anything on
6 this first page you want to do? They're all so old.

7 MR. CASTELLANO: I'm talking about the last
8 three on the page.

9 MS. FOX-YOUNG: Want to do the Ferris
10 Bueller dummy?

11 MR. CASTELLANO: Possibly. I'll see. I'm
12 just bringing that to the Court's attention. I don't
13 want to draw attention to the first part.

14 MS. FOX-YOUNG: Do you want to just put
15 something over this first eight, or whatever it is?

16 MR. CASTELLANO: I'll tell the Court that
17 the bottom three on the first page are at play.

18 THE COURT: So you're just going to give
19 me -- on his letter you're just going to give me the
20 information orally.

21 MR. CASTELLANO: Yes.

22 THE COURT: I'm not sure you attached it to
23 your motion, unless it was the letter.

24 MS. FOX-YOUNG: It's attached in the
25 filing. And I'm sorry, I don't have a printed copy

1 of it. It's an exhibit to 1558.

2 THE COURT: 1058.

3 MS. FOX-YOUNG: It's an exhibit to this
4 Document 1558. I don't have it printed out.

5 THE COURT: Ms. Standridge, can you print
6 out -- there is an attachment to this 1558. Can you
7 print it? So you're just going to give me or rely on
8 the information you would normally put on the screen,
9 is that what you're telling me?

10 MR. CASTELLANO: What I'll do, I'll just
11 ask the Court to -- I'll let the Court know that the
12 last three entries on that page are in play, and that
13 the conduct or the allegation for the 1987 to 1993,
14 we think are not in play.

15 THE COURT: Okay. All right. Okay. And
16 do you have either for the -- what -- for the rest of
17 the document you have tying them to overt acts?

18 MR. CASTELLANO: Mr. Perez was not charged
19 in the RICO indictment, so I do not have overt acts
20 for this.

21 THE COURT: All right.

22 MR. CASTELLANO: We can clarify that also
23 in the larger group.

24 THE COURT: All right. Anything else?

25 MR. CASTELLANO: No, sir. I just wanted to

1 let the Court know that.

2 THE COURT: Okay.

3 (The following proceedings were held in
4 open court.)

5 THE COURT: All right. I haven't been all
6 the way through the motion, but I now have the
7 motion, and I now have the attachment to the motion,
8 which is Ms. Armijo's letter of November 30. All
9 right. So you're going to do orally what we've been
10 doing a little bit on the screen. So you're going to
11 tell me which ones are out, Mr. Castellano?

12 MS. FOX-YOUNG: Your Honor, could I just
13 make a few remarks before we get into it on our
14 motion?

15 THE COURT: I should have allowed you to do
16 so. Yes, you may.

17 MS. FOX-YOUNG: Your Honor, the Government
18 alleges, I think, approximately 30 acts or provided
19 notice of approximately 30 acts. I'd just tell the
20 Court we contest that any of these are relevant to
21 the establishment of the enterprise, or -- and also
22 were not conducted in furtherance of the activities
23 of the enterprise. I think we have, in the interests
24 of efficiency, knocked out the first few, which
25 should make our work a little bit easier.

1 But I'll tell the Court, even on the
2 Government's evidence and allegations, the Government
3 doesn't even allege that Mr. Perez was a member of
4 the SNM, was a validated member until 2009. And so
5 the only acts that occur after that in this listing
6 are the final eight. Of those -- and we contest the
7 relevancy of the others as well -- and I won't get
8 into 404(b), unless the Government intends to notice
9 them that way. But in addition to the fact that
10 these -- you know, alleged crimes are crimes
11 committed on the streets, sort of minor disciplinary
12 issues, I'm looking at the last eight. In custody
13 are unrelated to the enterprise in any way. We also
14 have an issue where I think three of them may not be
15 Mr. Perez. And not having seen the underlying
16 documents, I can't be certain, and maybe Mr.
17 Castellano has more on that. But just looking at an
18 NM Court search, and trying to chase them down with
19 what we do have, I think the May 6, 2010, the August
20 31, 2010, and the February 10, 2012 incidents may not
21 be this Rudy Perez. But perhaps the Government has
22 the supporting documents which we have not received.

23 Thank you, Your Honor.

24 THE COURT: All right. Thank you, Ms.

25 Fox-Young.

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1 All right. Mr. Castellano, Ms. Fox-Young
2 indicated y'all had talked and some of these are off
3 the table.

4 MR. CASTELLANO: Yes, Your Honor.

5 THE COURT: Do you want to give me which
6 ones the Government will not be pursuing at trial?

7 MR. CASTELLANO: So on the first page of
8 the document we think at play at this point are the
9 bottom three allegations on page 1. So December 2,
10 1994, would be the first one on that page.

11 THE COURT: Okay.

12 MR. CASTELLANO: And then I haven't
13 finished discussing this with Ms. Fox-Young, but on
14 the second page I have marked through a few, which I
15 think we can agree on.

16 THE COURT: Okay.

17 MR. CASTELLANO: If I have any reason to
18 believe otherwise, I'll provide the documentation.
19 But at this point I don't think that we will.

20 THE COURT: Okay. Do you want to give
21 those to me?

22 MR. CASTELLANO: Yes, on page 2, there is
23 March 21, 2002, fraud. I have this one up on the
24 screen.

25 THE COURT: Oh, okay.

1 MR. CASTELLANO: Then June 27, 2002.

2 THE COURT: Okay.

3 MR. CASTELLANO: August 28, 2008.

4 THE COURT: Okay.

5 MR. CASTELLANO: And July 29, 2010.

6 THE COURT: All right.

7 MR. CASTELLANO: And in terms of the
8 documents that Ms. Fox-Young referenced, I don't have
9 anything at this point. He was another one I wasn't
10 able to check the underlying documents beforehand. I
11 will say that things like --

12 THE COURT: Now, what I understand is Mr.
13 Perez is not charged in the RICO counts, so we're not
14 talking about any of these being alleged or pled as
15 overt acts?

16 MR. CASTELLANO: That's correct, none of
17 these are alleged in overt acts in the RICO
18 indictment.

19 THE COURT: So are you intending to use any
20 of these as in any way to establish the enterprise or
21 that they were done in furtherance of the enterprise?

22 MR. CASTELLANO: Yes.

23 THE COURT: Do you want to identify which
24 ones you're going to so use?

25 MR. CASTELLANO: I'll go with the ones that

1 I think are easier, since I don't have the documents.
2 On the first page, the assault on two inmates in
3 April of 1996.

4 THE COURT: Okay.

5 MR. CASTELLANO: On September 23, 1996 -- I
6 have to look at the documents on that one. It's
7 related to a dummy made out of clothes on his bunk.
8 I don't recall what that was about.

9 THE COURT: Okay.

10 MR. CASTELLANO: May 7, 2003, he possessed
11 a stinger, a homemade weapon. So that would be the
12 expectation that members, and many times inmates,
13 sometimes are required to have homemade weapons or
14 shanks for protection and to assault others.

15 And then the other ones related to crimes
16 of violence would be assaultive behavior related to
17 the SNM. But once again, those I'm going to have to
18 find the underlying documents.

19 THE COURT: Is that the next one, December
20 31?

21 MR. CASTELLANO: Yes. And the following
22 one on February 14.

23 THE COURT: Okay.

24 MR. CASTELLANO: That's the same with all
25 of those. There is a possession of a controlled

1 substance and breaking and entering in 2007. I'm
2 going to have to look at those more closely. In
3 2008, there is bribery of a witness. That one could
4 be in play based on allegations in the indictment of
5 bribery or intimidation of witnesses. But for each
6 of these, frankly, I will have to go back and look
7 more closely at the documents.

8 THE COURT: All right. Let me ask the
9 question this way: If you cannot establish any of
10 these as related to the enterprise -- I'm putting
11 little e's next to these ones that you've
12 identified -- if the evidence doesn't pan out for
13 enterprise, will you agree not to try to get them in
14 through 404(b), to establish some other legitimate
15 purpose?

16 MR. CASTELLANO: I think the answer is
17 probably. Especially, if we have things like
18 assaults or batteries on the street, then I think
19 there is a pretty good chance we will not move the
20 admission, even under 404(b).

21 THE COURT: All right. Here's what I
22 propose: I propose to -- let me give the numbers
23 here, April 11, 1996, September 23, 1996, May 7,
24 2003, December 31, 2005, February 14, 2006, July 2,
25 2007, and January 18, 2008. For those, those are on

1 the table. The Government will give you proof that
2 those will be used, how they'll use those, or how
3 they'll prove those. So that you can determine
4 whether they're relevant to enterprise or furtherance
5 of the enterprise; understanding Mr. Perez wasn't
6 charged with that, but it's still evidence that can
7 be used to establish those things. And that will
8 allow you to make a more informed objection to
9 whether those actually prove it.

10 The rest will not come in through 404(b).
11 If Mr. Castellano wants to put something back on, he
12 needs to do that pretty promptly so that we can
13 discuss it. But for the present time, they're off
14 the table for 404(b). On some of the others, if he
15 wants to look and put them in what I'm calling the
16 enterprise, he needs to do that by January 22, and
17 then provide you the information that he's agreed to
18 provide the others.

19 Is that acceptable to the Government, Mr.
20 Castellano?

21 MR. CASTELLANO: It is, Your Honor. I'd
22 like to add two more to that list.

23 THE COURT: Okay.

24 MR. CASTELLANO: One is a May 6 to, 2010
25 possession of a controlled substance. And the caveat

1 is, if that was in prison; there is no indication
2 from the notes that it is. And then on June 6, 2010,
3 inciting other inmates, if that is SNM related. So
4 we would have to tie that in.

5 THE COURT: Okay. Otherwise, what I said
6 is acceptable to the Government?

7 MR. CASTELLANO: It is. Can you give me
8 the ones prior to May 7, 2003? That's where I was
9 caught up, but I missed the ones before that.

10 THE COURT: I had the April 11, 1996 event,
11 and the September 23, 1996 event, is what I'm putting
12 them in the e box, where they're going to be relevant
13 to enterprise or furthering the enterprise activity,
14 or they're not going to come in at all.

15 MR. CASTELLANO: We agree, Your Honor.
16 That's acceptable.

17 THE COURT: Can you agree to that
18 mechanism? Because, basically, you're not going to
19 see any 404(b) evidence at trial. You're only going
20 to see this coming in, if at all, to support their
21 proof on enterprise and furtherance of the
22 enterprise's activities.

23 MS. FOX-YOUNG: Yes, Judge. I think the
24 mechanism is fine. And we'll just renew any
25 objections at such time as they provide the proof on

1 those.

2 Thank you, Judge.

3 THE COURT: Let me ask you, Mr. Castellano:
4 Do you think, since Mr. Perez is not charged in the
5 racketeering side, that his 403 arguments have more
6 force than the folks who are charged with
7 racketeering activities, because this evidence is
8 being used -- it's prejudicial to the defendants, but
9 it's being used to establish the enterprise, which is
10 relevant solely to other defendants; that the 403
11 argument might have more force coming from Mr. Perez
12 than it would be from the others who are charged with
13 overt acts?

14 MR. CASTELLANO: I don't think I could
15 agree to that, Your Honor. I think, because when it
16 comes to a VICAR count, which Mr. Perez is charged
17 with, we only have to prove that the enterprise
18 engaged in racketeering activity. So any member of
19 the enterprise who does these things, it would be
20 attributable to the enterprise and to the other
21 defendants.

22 THE COURT: Yeah, I think I agree with
23 that.

24 All right. If we've taken care of, then,
25 his bad acts, I'll put that aside.

1 What -- do y'all have an understanding from
2 Ms. Wild what we're moving to now that we've
3 completed the things I brought down for these three
4 days? Mr. Castellano? Ms. Armijo? Did y'all have
5 some understanding if we were going to complete the
6 James hearing or the suppression hearings we were
7 going to try to clean up? What did y'all understand
8 we were going to do if we got through this stack?

9 MS. ARMIJO: I think we were going to
10 finish the James hearing.

11 THE COURT: James hearing. Defendants have
12 any disagreement?

13 MS. HARBOUR-VALDEZ: That was our
14 understanding.

15 THE COURT: So shall we take that up after
16 lunch then? All right. So we'll see y'all after
17 lunch. Have a good lunch.

18 (The Court stood in recess.)

19 THE COURT: All right. Let's go on the
20 record here. I think we've got an attorney for each
21 defendant. Look around the room, make sure everyone
22 has an attorney.

23 All right. Mr. Castellano, you indicated
24 that y'all had worked with Ms. Wild to move then to
25 the James hearing. Can you remind me where we are in

1 that proceeding?

2 MR. CASTELLANO: When we last left off, I
3 believe some people were cross-examining Agent Acee
4 regarding statements. And I don't know if anyone has
5 any cross remaining.

6 THE COURT: All right. Why don't I ask you
7 to return to the witness stand, Mr. Acee, and I'll
8 remind you that you're still under oath.

9 Did anyone who was questioning at the time
10 need to finish theirs? I know Mr. Lowry was up. But
11 was there anybody that was in the midst of
12 questioning Mr. Acee when we took a break?

13 MR. LOWRY: That was myself.

14 THE COURT: You were up? Okay. So you
15 want to continue, Mr. Lowry?

16 MR. LOWRY: I do, Your Honor.

17 And I just have one housekeeping matter I
18 want to address before we get going, if that's okay.

19 THE COURT: You may.

20 MR. LOWRY: Your Honor, at the beginning of
21 this week's hearings, I took over from Ms. Sirignano,
22 it's Document 1454 -- no, pardon me, there are too
23 many documents in this case, Your Honor -- but it was
24 Document 1329. And it was the motion for an order to
25 show cause.

1 I've worked with my colleagues on the other
2 side of this, and we've ironed out understandings on
3 all the issues. But after -- I want to -- frankly, I
4 want to pick up on a riff that the Court had this
5 morning about, you know, just the frustration level
6 in the courtroom. And it just reminded me of that
7 with the FBI agent that testified today, you know.
8 The reason I'm bringing this up is because, back in
9 May, at the hearings there were numerous motions to
10 compel a lot of it dealing with Brady and Giglio
11 material. And at the time, you had asked the
12 Government to look at rough notes and things like
13 that from FBI agents, and to lay eyes on those
14 documents, to see if there is any Brady or
15 Giglio-type material there. And it's just
16 disconcerting to the defendants and to counsel, when
17 we hear from an agent, like we did just now on the
18 stand, that, you know, they just got a request for
19 their rough notes yesterday. So we have no reason to
20 believe that that kind of Brady review has been done.
21 And it just speaks to the merits of this motion for
22 an order to show cause.

23 Now, I'm not a big fan of orders to show
24 cause. But I think it bears repeating, we heard this
25 last week as well. We saw a number of witnesses come

1 in and they're employees with the Department of
2 Corrections, and not necessarily low-level employees,
3 Deputy Director Roark is a high-ranking employee with
4 the Department of Corrections. And they all had
5 material that is relevant and disclosable in this
6 case, some of which is Brady material.

7 And I just want to implore the Court to
8 work with the defense teams, and you know, get our
9 colleagues in the U.S. Attorney's Office to perform
10 the type of Brady review that this Court requested
11 back in May of this year. So --

12 THE COURT: Well, is the motion, though,
13 that, the show cause, is there anything else to be
14 done on that? Did you reach an agreement with --

15 MR. LOWRY: We reached an agreement on
16 everything, and we're actually working on that. But,
17 if you look at the motion itself -- and the United
18 States responded at Doc No. 1401, and the defendants
19 replied at Document 1454.

20 But the part -- the reason I'm bringing
21 this up now is one of the things that was left
22 outstanding -- and I did talk with my colleagues, and
23 I told them I was going to bring this to the Court's
24 attention, and that was before the testimony today --
25 but on page 4, there is a bullet point that -- one of

1 the requests is to review or disclose Brady, Giglio,
2 and Rule 16 notes of CHS law enforcement handlers
3 within 14 days. And there is a cite to the May
4 transcripts in here.

5 And, again, it bears repeating, especially
6 in light of the testimony that we just heard, that
7 the request hadn't even been made for Eric Duran's
8 handler. And, obviously, Eric Duran is going to be a
9 key witness for the Government. And, frankly, if
10 it's an oversight, it's an oversight that's, in my
11 view, inexplicable.

12 THE COURT: All right. What's your
13 request, though?

14 MR. LOWRY: Well, I think at this point,
15 you know, everybody was familiar with the Court's
16 ruling after the May hearing -- and I believe that's
17 Doc 907, when the Court in a very lengthy opinion
18 walked through the remedies, and all of this, you
19 know, the requests. And the Court laid out in very
20 detailed fashion what the appropriate response is,
21 and asked the parties to work, as this Court always
22 does, in a collegial and professional fashion.

23 And when I filed our request for Brady and
24 Giglio materials, you know, months ago, I
25 acknowledged the Court's position. And my last

1 sentence in that motion was, you know, we're waiting
2 patiently. But patience wears thin.

3 And I think as we approach -- and I'm not
4 going to be good with the days, but I think you said
5 it this morning we're, what, maybe 31 days from
6 trial.

7 THE COURT: I think we're 39 days from
8 trial.

9 MR. LOWRY: This is the type of material
10 that we need to be working with and working on, to
11 develop the defenses in this case. So, at this time,
12 I think we need to ratchet up the remedy a little
13 bit. And I know that the Court said maybe it's a
14 limitation on the scope of testimony of a witness, or
15 maybe it's a striking of a witness. But if we can't
16 get the raw material that this Court ordered to be
17 produced in May of this year, and we're this close to
18 trial, I think that the Court has to consider other
19 appropriate remedies that the circuits have
20 authorized the Court to consider.

21 THE COURT: Well, but what are you asking
22 me to do? On one hand, you're telling me that you've
23 worked with the Government to resolve all outstanding
24 disputes. But I'm just hearing kind of a complaint.

25 MR. LOWRY: Well, it's not a complaint. We

1 just heard from the FBI agent that she has rough
2 notes.

3 THE COURT: What do you want me to do?

4 MR. LOWRY: I want you to order them to be
5 produced.

6 THE COURT: I think they've agreed to
7 produce it. They're shaking her heads yes, it's
8 going to be produced.

9 MR. CASTELLANO: If I remember correctly,
10 this morning I couldn't remember but I think Ms.
11 Armijo reminded me that the CI file for Eric Duran
12 was disclosed on Monday. So the defense can confirm
13 that or not.

14 THE COURT: That's en route to Mr. Aoki?

15 MR. CASTELLANO: I believe it was sent to
16 him on Monday, if I'm not mistaken.

17 MR. LOWRY: In fairness to my colleagues
18 here, they worked with us and got us materials that
19 were relevant to the ELSUR motion, Your Honor.

20 But I guess I've been asking for these
21 rough notes for some time. And we hear today that
22 they do exist. And they weren't even brought to the
23 courtroom. And this is in light of multiple
24 requests.

25 So I guess, Your Honor, if the Court is not

1 inclined for any other relief, can we expedite that,
2 so we can get them in the next couple of days? There
3 is scans. There is fax. I mean, there is ways to
4 make that happen.

5 I would just ask to admonish the United
6 States that they know who the key witnesses are in
7 this case. They know who the right folks at the
8 Department of Corrections are. We heard about the
9 STIU unit. And this gives me some concern. They've
10 disclosed what the testimony was, I believe, from
11 Adam Vigil, that there is a hard STIU file. And
12 that's what we got. But he also testified at length
13 about a soft STIU file. And nobody has seen the,
14 quote, "soft STIU files."

15 And the sense I've had from all the
16 hearings we've had is there is materials scattered
17 hither and yon. And we're not seeing the light of
18 day of any of it.

19 And as we approach trial, I get more
20 concerned about substantial reservoirs of, as
21 Ms. Jacks pointed out, exculpatory material, in the
22 sense that they debrief with these folks; some people
23 say: These folks are involved, but not those.
24 Others have a different set of people that are
25 involved. The absence of involvement is exculpatory.

1 And I think all of these materials need to be sifted
2 and reviewed and disclosed.

3 And I wish I had a more confident feeling
4 that that was being done in a methodical, timely, and
5 efficient manner. And it is a complaint, Your Honor.
6 But I think it's a complaint worth taking notice of,
7 given the testimony we've seen over the course of the
8 last two weeks.

9 It's not just a complaint. It's a
10 complaint with merit.

11 THE COURT: Well, I guess I don't agree
12 with Ms. Jacks, that just because a name doesn't
13 appear, that's exculpatory. I think that reads Brady
14 way too broadly. So I'll not adopt that.

15 Now, you're getting the file. There is no
16 guarantee it contains either Rule 16, exculpatory, or
17 Brady material. So the Government is just providing
18 it to you. I won't order any special deadlines on
19 it.

20 So right at the moment, with the resolution
21 of the motion to show cause, I don't see a problem.

22 So let's continue our examination of Mr.
23 Acee at this time. Mr. Lowry.

24 JAMES HEARING RESUMES

25

1 BRYAN ACEE,
2 after having been previously sworn under oath,
3 was questioned and testified as follows:

4 EXAMINATION

5 BY MR. LOWRY:

6 Q. Agent Acee, good afternoon.

7 A. Good afternoon.

8 Q. Agent Acee, you were the handler for Eric
9 Duran?

10 A. Yes, sir.

11 Q. And was testimony we heard this morning
12 correct that you took over those responsibilities in
13 early August of 2015?

14 A. Yes, sir.

15 Q. And as part of your working with Mr. Duran,
16 you spoke to him about how to record statements?

17 A. That's fair to say. I mean, he'd already
18 had a device and was in the facility by the time I
19 met him.

20 Q. And one of the things you reminded Mr.
21 Duran of is that he was essentially working for the
22 Government?

23 A. Yes.

24 Q. And you implored him, when he was making
25 recordings, that he had to get two people to speak

1 directly to each other, because his status as a
2 Government agent, individuals could not conspire with
3 him?

4 A. Yes, at times. Because he'd set up drug
5 deals on the street, yeah.

6 Q. But that's a point you wanted to emphasize
7 with him, that because he's a Government agent, you
8 cannot conspire with a Government agent?

9 A. Correct.

10 Q. Did you have a similar conversation with
11 Mario Montoya?

12 A. Yes.

13 Q. And when did you open a file for Mario
14 Montoya to become a Government agent?

15 MR. CASTELLANO: Objection, relevance.

16 MR. LOWRY: The relevance, Your Honor, is
17 for the James hearing, the three prongs: We have to
18 show, one, that there is a conspiracy. And I think
19 what the agent just testified is it's impossible to
20 conspire with the Government agent. So the timing of
21 this would be critical for the defense to understand
22 what statements made to Mr. Montoya were during that
23 period of time.

24 MR. CASTELLANO: Well, we agree that the
25 Government cooperator cannot be a member of the

1 conspiracy. But we're not focusing on the actual
2 statements themselves to make that determination.

3 THE COURT: Well, I'll overrule the
4 objection. He can state when he opened the file.

5 A. It's tough for me to say exactly when. But
6 it was fairly early on in my opening of the SNM case.

7 Q. Do you think it was before August of 2015?

8 A. No.

9 Q. Can you just give us a month?

10 A. I can't. I can get back to you with an
11 exact date.

12 Q. Okay. I appreciate that. I'll take you at
13 your word on that.

14 A. Before the day is over, I can have an
15 answer.

16 Q. Thank you.

17 Is it fair to say that in the recorded
18 calls from Duran to the people outside of the
19 facility that there was some effort on the part of
20 the folks inside the facility to keep Chris Garcia in
21 the dark about why they needed weapons?

22 A. I think that there was initially -- that's
23 true initially of Mr. Baca, from my interpretation of
24 the conversation.

25 Q. And again, but not just your

1 interpretation, but the recordings actually reflect
2 that they didn't want Mr. Garcia to have any idea
3 what they were doing?

4 A. Yes, that's what I'm trying to say.

5 Q. Okay. Did you have to instruct Mr. Montoya
6 to inform Mr. Garcia what the purpose of the weapons
7 was for?

8 A. I think I did.

9 MR. LOWRY: No further questions, Your
10 Honor.

11 THE COURT: Thank you, Mr. Lowry.

12 Any other defendant have questions of Mr.
13 Acee on this portion of the James hearing?

14 All right. Mr. Castellano, do you have
15 redirect of Mr. Acee?

16 MR. CASTELLANO: No, Your Honor.

17 THE COURT: All right. Mr. Acee, you may
18 step down. Thank you for your testimony.

19 All right. Mr. Castellano, on this portion
20 of the James hearing, do you have further witnesses
21 or evidence?

22 MR. CASTELLANO: No, Your Honor.

23 THE COURT: All right. How about the
24 defendants? Do they have witnesses or evidence they
25 wish to present?

1 All right. Mr. Castellano, do you want to
2 argue this motion?

3 MR. CASTELLANO: Your Honor, there has been
4 a question and ongoing discussion between the parties
5 about how best to proceed at this point. So the
6 Government has introduced the statements, a large
7 number of statements. And so I think everyone is
8 looking for a little guidance on whether we just
9 argue about categories of statements, or whether the
10 Court is interested in going over each of the
11 statements to discuss why they're co-conspirator
12 statements, and things of that nature? And I'm happy
13 to do it either way.

14 Also, do you have the plea agreements that
15 were introduced at the beginning of the James
16 hearing? It was about 15.

17 THE COURT: I have not taken any exhibits
18 over the last two weeks back to Albuquerque. So
19 they're probably somewhere here. Let me see what I
20 got here. Because we haven't been finishing, I'm
21 reluctant to take anything back. I have what has
22 been marked as Exhibits 1 through 15, which I think
23 were the plea agreements, am I correct?

24 MR. CASTELLANO: Yes.

25 THE COURT: So attached, so Exhibits 1

1 through 15 to the James hearing, I do have. Do you
2 need to look at them?

3 MR. CASTELLANO: Yes, please.

4 THE COURT: All right. Do you need 16A?
5 This is just all the exhibits. Let me just hand
6 those back. Those are the exhibits to the James
7 hearing.

8 MR. CASTELLANO: One of the purposes of the
9 exhibits was to establish the elements of the
10 co-conspirator statement. So as the Court knows, we
11 have established the existence of the conspiracy,
12 membership of the conspiracy, and that the statements
13 were made in furtherance of the conspiracy.

14 So I'm looking at Government's Exhibit 1.
15 It's a plea agreement by Mario Rodriguez. And so
16 there is evidence of the existence of the conspiracy.
17 He pled guilty to the charge. And then, on page 6 of
18 11 of his plea agreement, there is discussion of not
19 only the conspiracies in which he was involved, but
20 who was involved. And so I'll just use this as one
21 example. But for each of these there is evidence of
22 the existence of a conspiracy, just through the plea
23 agreements themselves, which were sworn statements
24 given to a Court.

25 So for purposes of the Molina murder, there

1 is the existence of the conspiracy contained within
2 this document. And it names Carlos Herrera, Timothy
3 Martinez, Jerry Montoya, Daniel Sanchez. And I may
4 be missing some names, I'm glossing over it. But
5 clearly there is a conspiracy. And we have members
6 of that conspiracy listed in this document alone.
7 And so I would argue the same for each of these.
8 Jerry Montoya would be related to the Molina murder.
9 Same with Timothy Martinez and Jerry Armenta.

10 Also, look at the plea agreements for
11 Robert Martinez. That's Exhibit Number 10. In that
12 exhibit he states at the bottom of page 5, he
13 conspired with Roy Martinez, Anthony Baca, and others
14 to murder GM and DS, which we know is Gregg Marcantel
15 and Dwayne Santistevan, and lays out a little bit of
16 the conspiracy. So that's the existence of the
17 conspiracy to murder Santistevan and Marcantel. And
18 an admission in there that he did conspire with
19 others to commit that murder.

20 Roy Paul Martinez has a plea agreement,
21 which is Government's Exhibit 11. And in there he
22 admits that he conspired with Robert Martinez and
23 Anthony Baca to murder Gregg Marcantel and Dwayne
24 Santistevan.

25 So a number of these conspiracies -- I'm

1 not sure if it's all of the -- but many, if not all,
2 are covered. So I tender those to the Court for
3 purposes of the James hearing to establish the
4 existence of those conspiracies. And it also names
5 members of those conspiracies.

6 So I think at that point, for the most
7 part, we can move on to the in furtherance
8 discussion. So if can I talk about the statements as
9 a whole, as we briefed this, this is a page from one
10 of our responses, Document 1243. And in the in
11 furtherance discussion on page 5, we indicate that
12 "Statements made to induce enlistment, or further
13 participation in the group's activities, to prompt
14 further action on the part of conspirators, to
15 reassure members of the conspiracy's continued
16 existence, to allay the co-conspirators' fears or
17 keep co-conspirators abreast of an ongoing
18 conspiracy's activities are examples of statements
19 which are in furtherance of a conspiracy.

20 "Similarly, statements which identify other
21 members of the conspiracy, and statements regarding
22 the roles of other co-conspirators are statements
23 which are made in furtherance of the conspiracy."

24 In the last questioning, Mr. Lowry touched
25 on this a little bit. It doesn't necessarily matter

1 who you're speaking to, as long as there is a
2 conspiracy. So what matters is not to whom the
3 statements are made, but the declarant's intent in
4 making the statement.

5 Also, the statement itself doesn't have to
6 further the conspiracy to be admissible. It's enough
7 that the statements be intended to promote the
8 conspiratorial objectives.

9 So in one of the statements we discussed,
10 as we were introducing the statements, was a
11 statement by Mr. Baca to one of the cooperators. And
12 he indicated that Chris Garcia would finance the
13 operation, meaning the conspiracy to murder Gregg
14 Marcantel. So that would be one example of where one
15 member of the conspiracy identifies another member of
16 the conspiracy. And it doesn't necessarily matter
17 when Chris Garcia joined that conspiracy. He's
18 ultimately responsible for what was contained in the
19 conspiracy when he joins.

20 So that's my overview of these statements.
21 And there is a Tenth Circuit case from this year,
22 Alcorta, 853 F.3d, 1123. And there is a modification
23 or an addition to statements that are in furtherance
24 of -- I'll find it here for the Court. On, I believe
25 it's page 1137, of that opinion is a reiteration of

1 what I told the Court already about what can be used
2 or what signifies a statement in furtherance of the
3 conspiracy. But then they had a little bit more on
4 page 1139 of that case. And it says, "When a
5 conspiracy is ongoing, statements that relate to
6 avoiding detection by law enforcement personnel can
7 be in furtherance of the conspiracy. Concealment of
8 the crime done in furtherance of the main criminal
9 objectives of the conspiracy falls within the
10 co-conspirator exception." So that is something else
11 the Court can consider when looking at these
12 conspiracies.

13 Now, we're at the point, Your Honor, where
14 we could start getting into the statements. That's
15 just kind of an overview. However the Court wants to
16 do it, I'm happy to proceed that way.

17 THE COURT: Let me propose this: It
18 certainly seems to me there has been sufficient
19 evidence for the Court to find by a preponderance of
20 the evidence, which I think is the requirement on a
21 James hearing, that I find that the Government
22 established by a preponderance of the evidence that a
23 conspiracy exists; that the members, the defendants,
24 and the declarants were members of the conspiracy,
25 and that the statements that I have heard, that I've

1 listened to carefully, that I've looked at were made
2 in furtherance.

3 I think the Government has put on a fairly
4 comprehensive demonstration for these statements.
5 And these are the statements -- remember, that
6 they're going to introduce pursuant to the
7 co-conspirator statements. And if they did not bring
8 it into the James hearing, then we're not going to
9 try to see it through the -- we're not going to see
10 the Government trying to get it in through a
11 co-conspirator statement.

12 So it's a fairly contained list of
13 statements that the Government has brought forward.
14 As I've listened to those, as I've read them, I have
15 not seen anything that would not come in under the
16 co-conspirator statement.

17 I guess what I would do -- I mean,
18 ultimately, it's the Government's burden, but I think
19 they've met their burden. Unless the defendants
20 bring statements to me and say, you know, just as you
21 would in the course of trial, you'd make an
22 objection, and that's the way you note that they
23 haven't done it.

24 So it would seem to me that, probably, the
25 Government ought to sit down, and that I ought to be

1 quiet, and see if anybody disagrees with the
2 conclusion that I've reached. It's a tentative
3 conclusion, subject to your arguments.

4 But I'm not sitting here seeing in the box
5 that we've taken in James over several days, and now
6 over several weeks -- so if the defendants want to
7 challenge some and have me relook at them, and think
8 of them in general, and have the Government argue in
9 specific, I'm game.

10 But, otherwise, the box we have put the
11 Government in in these particular statements, I'm not
12 seeing why they shouldn't come in under
13 co-conspirator. They seem to meet all three prongs.

14 Mr. Castellano, unless you have something
15 else you want to do, we might see if the defendants
16 want to pick up some individual statements.

17 MR. CASTELLANO: I agree with that
18 approach, Your Honor. I just want to add one
19 statement that came out of Billy Cordova's testimony.
20 He was talking to Daniel Sanchez through the door.
21 Daniel Sanchez told Billy Cordova, "I already hit him
22 up," meaning he had already taken the -- taken or
23 agreed to take the shanks from Mr. Perez' walker. I
24 think that would clearly fall within James.

25 THE COURT: I think so, too. I mean, I

1 think, if you're going to have a statement where
2 somebody is confirming that has occurred, that's what
3 a business does. It confirms these actions are
4 taken. So I would think that would fall within the
5 co-conspirator statement as well.

6 MR. CASTELLANO: I don't have anything
7 further, Your Honor.

8 THE COURT: All right. Why don't you be
9 ready to argue each one of these that the defendants
10 want to raise.

11 Anybody want to raise any particular
12 statement that they think is not going to fit in?

13 Mr. Lowry?

14 MR. LOWRY: Thank you, Your Honor.

15 THE COURT: Mr. Lowry.

16 MR. LOWRY: Your Honor, I appreciate the
17 Court's attention over the last couple of weeks on
18 this hearing and these matters.

19 Your Honor, understanding the way this case
20 has been charged -- and I guess I'm going to beg the
21 Court's indulgence on what the Court means -- the
22 Court just ruled that you're inclined to conclude
23 that a conspiracy exists. And this is something I've
24 been struggling with.

25 THE COURT: Well, there is two conspiracies

1 that the Government is proposing. One on the Molina
2 murder, and then the other on the threats on
3 Marcantel. And so those are the two conspiracies.
4 So we've taken those separately.

5 It seems to me that being precise, I think
6 that those two conspiracies exist. And that,
7 therefore, in the box that we did of each one, it
8 seemed to me, listening carefully, I didn't see
9 that -- it seemed to me that they had established by
10 a preponderance of the evidence conspiracies on both
11 those boxes. So a little bit more precise. That's
12 what I meant.

13 MR. LOWRY: Thank you, Your Honor. Because
14 I just want to make sure if I understood the Court's
15 perspective. I guess, for lack of a better term,
16 there have been two separate conspiracies that may
17 have overlapped at certain places with the players.

18 THE COURT: They may have. Although, the
19 way the Government has presented it, I think, has
20 been that they are separate conspiracies. They all
21 go to trying to advance the cause of the enterprise.
22 But I think the way they've tried it, they mounted
23 the burden of them being separate conspiracies,
24 unless Mr. Castellano tells me something different or
25 I missed something.

1 MR. LOWRY: I just want to make sure we're
2 all on the same page, Your Honor.

3 So I do have a bit -- and I want to take
4 this as a broad category -- and think we just heard
5 argument from the Government trying to address this
6 with the citations to the "in furtherance" prong of
7 the analysis. And the Court said that, in its view,
8 everything that the Court heard would come in under
9 James.

10 But I want to draw the Court's attention to
11 the recorded conversations with Mr. Perez that took
12 place years after the homicide.

13 THE COURT: Do you have either this you can
14 put on the Elmo, or do you have Mr. Acee's -- the
15 outline that he was reading from so, that we can
16 really zero in on the statement? If you don't, we'll
17 manage without it. But it helps me to see it if you
18 have it.

19 MR. LOWRY: Absolutely, Your Honor. I have
20 citations to the transcript.

21 MR. CASTELLANO: I think Mr. Perez' was
22 Exhibit 16. I believe that was a single transcript.
23 And Mr. Lowry is welcome to borrow mine. I have
24 tabs.

25 MR. LOWRY: I have it here, Your Honor.

1 Here it is on the Elmo.

2 THE COURT: Do you want to identify this
3 for the record?

4 MR. LOWRY: Sure. For the record purposes,
5 Your Honor, this is Government's Exhibit 16. And
6 this is at DeLeon Bates No. 20529. And as you can
7 see from the date of the recording, this is in
8 February of 2016, so the Molina event was March --

9 THE COURT: So this is Mr. Cordova
10 recording Mr. Perez?

11 MR. LOWRY: That's correct, Your Honor.

12 And if you move throughout the document
13 that I believe Mr. Castellano had highlighted, there
14 are statements in here, and they're attributing some
15 of these statements to Mr. Baca.

16 THE COURT: All right. Why don't you pick
17 which one, and let's analyze it in some detail.

18 MR. LOWRY: Okay.

19 THE COURT: You would agree with me that
20 this transcript itself -- this is the statement of
21 Mr. Perez -- it doesn't need a co-conspirator
22 statement. It can come in. And then, of course,
23 you've got the Smalls issue to deal with --

24 MR. LOWRY: The Bruton issue.

25 THE COURT: -- it's coming in. So the

1 transcript is coming in. So now we're just dealing
2 with whether what Mr. Perez said -- which may be an
3 out-of-court statement of Mr. Baca being offered for
4 the truth, it contains something that needs its own
5 separate exception. That's what we're about to
6 discuss, right? Do you agree with that analysis?

7 MR. LOWRY: Well, no. I'm looking at this
8 as still under the co-conspirator statement analysis.

9 THE COURT: Well, I don't think that Mr.
10 Perez necessarily -- you can talk to me, if you think
11 differently, Mr. Castellano -- but the statements
12 that are being recorded here, are you taking the
13 position that the Perez/Cordova statements would be
14 in furtherance of the conspiracy?

15 MR. CASTELLANO: Are Mr. Cordova's
16 statements?

17 THE COURT: Well, I think that what Mr.
18 Lowry -- I didn't think I needed to analyze, under
19 the co-conspirator exception, the recording of
20 Cordova with Mr. Perez. That was coming in because
21 it was an admission of Mr. Perez to Mr. Cordova. So
22 it's just not hearsay. So the only thing that needed
23 a co-conspirator statement was Mr. Perez' statements
24 in this recording that are statements of, for
25 example, Mr. Baca, that were made in the past,

1 perhaps giving directions to people about killing Mr.
2 Molina. And that's where they were analyzing the
3 co-conspirator exception.

4 Do you agree with my analysis?

5 MR. CASTELLANO: I do agree with that. I
6 think some of these statements may fall within
7 Smalls.

8 One discussion we were having outside
9 before the hearing was, at the bottom of page 20531
10 there is an example of Rudy Perez, a couple of years
11 after the murder, recounting the conversation during
12 the time of the conspiracy. So what he describes is
13 people coming in to him, and they tell him, "Look,
14 Big Dog, something has to be taken care of. But we
15 need squina. You don't have to do nothing, you don't
16 have to do nada." And this is the discussion where
17 they're saying: You don't need to do anything else
18 other than provide your walker for the shanks.

19 THE COURT: All right. Let me break it
20 down. Mr. Cordova doesn't need a hearsay exception,
21 because under the rules, it's not hearsay.

22 MR. CASTELLANO: Correct.

23 THE COURT: Okay. Now, his statement about
24 what other people told him, that's where we need the
25 co-conspirator exception. And that seems to me, what

1 you are looking at, or highlighting right there,
2 would be in furtherance of the conspiracy.

3 Do you agree with my analysis?

4 MR. CASTELLANO: Yes, I do agree, even
5 though it happened a couple years after he's
6 recounting a conversation at the time of the
7 conspiracy, I think of it as a James statement.

8 THE COURT: I agree. I guess that's where
9 Mr. Lowry and I disagree. But I just want to make
10 sure that you and I were on the same -- that the
11 first analysis of -- I don't need a co-conspirator
12 exception for the tape of Mr. Perez to come in. I
13 need co-conspirator when Mr. Perez is, in that tape,
14 talking about conversations that may have been said
15 to him.

16 MR. CASTELLANO: I agree.

17 THE COURT: All right. And you disagree
18 with that analysis, Mr. Lowry?

19 MR. LOWRY: Well, Your Honor, for this
20 particular statement, I mean, this doesn't even
21 involve Mr. Baca. The squina, you know. So in a
22 sense, I'm only concerned with the statements that
23 could be attributed through the lens of the
24 co-conspirator hearsay exception to my client.

25 THE COURT: Okay. I mean, if that doesn't

1 bother you, we can take another example. But I think
2 that probably that one would come under the
3 co-conspirator statement, because even though it's
4 being made in a more recent time, it's recording
5 conversations that were made earlier in furtherance
6 of the conspiracy.

7 MR. LOWRY: Your Honor, this may be
8 helpful. Can I get my trial transcript, because I
9 have --

10 THE COURT: You may.

11 MR. LOWRY: Your Honor, I think I would let
12 one of my colleagues go through there, but I want to
13 break them out statement by statement, if I could.

14 THE COURT: All right.

15 MR. LOWRY: But I guess I hear what the
16 Court is saying, but what I understood Mr. Perez to
17 say in the recordings is he's attributing things to
18 Mr. Baca about what he wanted to have happen. And
19 those were well after the fact.

20 THE COURT: Give me an example, even if
21 it's not exact.

22 MR. LOWRY: He refers to them as "The
23 viejo." Right. This is at Bates DeLeon number
24 20558.

25 THE COURT: Do you want to put it on the

1 Elmo?

2 MR. LOWRY: Absolutely, Your Honor. And
3 you can see it right here, where this is Mr. Perez,
4 and he's saying, quote, "The old man was pissed bro,
5 he was like, he was upset with them the other fools
6 over there, why didn't they handle it a year sooner
7 when they took the paperwork over there? Well you
8 send paperwork up there."

9 Well, it would seem to me -- assuming "Old
10 man" refers to Mr. Baca, which I think it does -- his
11 complaints to Mr. Perez, another member of the
12 conspiracy, as has been proved by the Government, and
13 Molina would be in furtherance. I mean, that's what
14 people do when they're in a conspiracy. They
15 complain to members of the group. And the reason you
16 complain is to try to make the group better, or
17 advance your purposes. So it seems to me that that
18 would be classic co-conspirator exception material.

19 MR. LOWRY: Well, I'm having a hard time --
20 if this complaint can be attributed to Mr. Baca, it's
21 a complaint about after the fact, after the objective
22 of the alleged conspiracy has been completed.

23 THE COURT: Well, but, I mean, if you're
24 now going to start talking about some of the
25 paperwork I looked at, Mr. Baca was ordering further

1 hits on people because they didn't do a good job on
2 the Molina murder, then it seems to me that this may
3 be in furtherance of the conspiracy because it's
4 covering up the murder.

5 MR. LOWRY: Well, Your Honor, analytically,
6 I have a bit of an issue with that, because now we're
7 shifting conspiracies and we're not talking about the
8 conspiracy to --

9 THE COURT: No, I think the conspiracy to
10 cover up the act of the conspiracy is just as much a
11 part of the conspiracy. And that's what that case
12 that we just looked at says.

13 So if Mr. Baca is going to continue actions
14 of directing people to be hurt or assaulted or
15 killed, because they did it wrong, or something like
16 that, I think that's all part of the same conspiracy.
17 He's unhappy as a leader with how it was carried out.

18 MR. LOWRY: If you assume -- well, this
19 goes back into the disagreement I think I had with
20 the Court during the presentation of the witnesses,
21 if you assume the credibility of the statements. It
22 sounds to me like the Court --

23 THE COURT: I have to make by a
24 preponderance -- but you're right, it does go back.

25 MR. LOWRY: So I think that's something,

1 Your Honor, we just have to argue about during the
2 evidence at trial, if that's the Court's ruling, if
3 this continues to be in furtherance of the
4 conspiracy. I mean, my real objection was just
5 that --

6 THE COURT: Let's do this: It's probably
7 not going to benefit us to have a big James hearing
8 and then us do this, and then argue again through
9 trial. I'm making the best call I can.

10 Do this: If you disagree with the scope,
11 give me some cases. I told you I tip my hand. I
12 like Saltzburg. So dig into him, and see if you can
13 convince me that I'm reading the co-conspirator
14 exception too broadly.

15 But when I look at the Tenth Circuit cases,
16 and Mr. Castellano is putting those up, so he's
17 showing the same ones I'm looking at, if I'm reading
18 it too broadly, I'll be glad to take another look at
19 it.

20 MR. LOWRY: That would be --

21 THE COURT: I'm trying to give you some
22 rulings, keep things moving, and it seems to me these
23 are falling fairly squarely within that. I don't
24 mean to cut you off in any way. I mean, if you've
25 got more to present. I'm trying to give people

1 guidance.

2 MR. LOWRY: No, Your Honor. That would be
3 my preference is to methodically go through this and
4 reduce it to paper. I think it would be beneficial
5 for everyone involved.

6 THE COURT: Well, I'm not inviting more
7 paper. But if you have a case that you think I'm not
8 reading this right -- you're putting up examples, and
9 I think that's good, because it forces me to apply
10 these general principles I read from the Tenth
11 Circuit to what we've got to do in this case, and I
12 don't want there to be an analytical gap here -- but
13 if you're finding that the case law is not what I
14 think it is, I particularly welcome that.

15 MR. LOWRY: I'll bring it to the Court's
16 attention.

17 THE COURT: All right. Thank you, Mr.
18 Lowry.

19 Ms. Bhalla, did you want to bring some to
20 the Court's attention and get some rulings on them in
21 specific?

22 MS. BHALLA: You know, Your Honor, just
23 briefly. I'm not going to try and go through each of
24 the statements. But I think that I, in my mind,
25 found the case that I find to be relevant to the

1 inquiry about -- in terms of when the statements are
2 made. And it's a Ninth Circuit Court of Appeals
3 case. It's United States v. Smith, 893 F.2d 1573.
4 And I was sort of looking at a little bit of that
5 over the lunch break, and a little bit during the
6 hearing.

7 THE COURT: I'm certainly not suggesting
8 that when a statement is made is not relevant. For
9 example, we'll take Mr. Perez' statements to Mr.
10 Cordova. They're not coming in to the hearsay
11 exception. Why? Because it's all over. Right? Mr.
12 Cordova -- Mr. Perez has got his own reason for
13 talking to Mr. Cordova. And so that seems to me to
14 probably not be in furtherance of the conspiracy.
15 And I think the Government is not trying to put it in
16 there.

17 But it seems to me, if Mr. Perez is talking
18 about what was said to him at the time or during the
19 time of the conspiracy, then the timing issue is less
20 relevant. Other things may be relevant, like what
21 was said. That's the reason we're keying in on
22 what's said. But it seems to me that, just because
23 Mr. Perez made his statement, you know, in 2015 --
24 the murders occurred in 2012 -- that doesn't mean
25 it's not within the hearsay exception.

1 Did the Ninth Circuit say something
2 different? I'm glad to be educated on it.

3 MS. BHALLA: I'll just read this brief
4 blurb, if that's all right, Your Honor. And I may be
5 off base.

6 THE COURT: Give it to me.

7 MS. BHALLA: This isn't my best area.

8 THE COURT: No, give it to me.

9 MS. BHALLA: "In order for a statement to
10 be admissible, a statement by a co-conspirator must
11 be made in course and in furtherance of the
12 conspiracy." I think we all understand that.

13 Three separate inquiries must be made by
14 the court. "First, the Court must find independent
15 proof of the existence of the conspiracy." I think
16 we've talked about that.

17 Second, "The Court must find the proposed
18 statement was made in furtherance of the objectives
19 of the conspiracy." I think we're good on that.

20 And this is where I'm getting -- where I
21 think it's important. "Third, the Court must find
22 that the proffered statement was made during the
23 course of the conspiracy. In addition, a necessary
24 corollary to the above three conditions is the
25 requirement that there must be" -- I may be going on

1 too far here -- "there must be independent proof of
2 the defendant's and declarant's status as members of
3 the same ongoing conspiracy."

4 To me, that limits when the statement was
5 made, Your Honor. And I may be reading that wrong,
6 but that's how I'm reading it.

7 THE COURT: Well -- and I don't mean to get
8 you involved in Mr. Perez. But let's just take the
9 statement, the hypothetical that we had when Mr.
10 Perez is on the phone with Mr. Cordova, and he's
11 talking, but he's talking about statements that were
12 made -- let's make our example easy -- were made
13 contemporaneous with the Molina murder. Would you
14 agree with me, just simply the fact that Mr. Perez is
15 making the statement a few years later is irrelevant,
16 if he's relating statements that were made at the
17 time that the murder occurred?

18 MS. BHALLA: I don't know that I do agree
19 with that. But I'm not the best to necessarily argue
20 that.

21 THE COURT: Okay. See, I don't hear
22 anything that the Ninth Circuit is saying that I
23 would not apply. The Tenth Circuit may put it a
24 little differently, and may put it in a different
25 order. But I think the Tenth is saying about the

1 same thing.

2 And so I'm not disagreeing with the legal
3 principles. I'm just trying to apply those now to
4 the fact-specific case that we have here.

5 MS. BHALLA: Okay. I understand, Your
6 Honor. And if I find something else --

7 THE COURT: Think about it.

8 MS. BHALLA: I will. Thank you.

9 THE COURT: I think I'm right. But I don't
10 mind being educated on it.

11 MS. BHALLA: Thank you, Your Honor.

12 THE COURT: Okay. Do you want to respond
13 on that?

14 MR. CASTELLANO: I just want to make a
15 quick point. Going back to the example that Mr.
16 Lowry had about Mr. Baca not being happy that the
17 murder hadn't happened sooner. I think, even if it
18 were to fall out of a James statement, I think we
19 would then be falling into Smalls' statements as a
20 statement against interests. So, for example, Mr.
21 Baca would be saying "I'm not happy that the murder
22 wasn't taken care of a year earlier." That's still a
23 statement against interests.

24 THE COURT: Well, let me ask you this:
25 Would you be unwilling to defend on appeal, if I were

1 to find that comes within a co-conspirator, does that
2 make you nervous for me to ground it in that area?

3 MR. CASTELLANO: I would say it makes me a
4 little bit nervous for this reason: When Mr. Perez
5 talks about his conversation with Mr. Baca, we're not
6 quite sure of the timeframe. So is it a conversation
7 he had with him after the conspiracy concluded? Is
8 it something else -- you know, I'm not sure when,
9 necessarily, that happened. All we know is they had
10 a conversation; Mr. Baca relayed to him he wasn't
11 happy it wasn't done a year earlier.

12 THE COURT: And the Smalls problem
13 satisfies the Bruton problem as to the other
14 defendants?

15 MR. CASTELLANO: That's correct. Because
16 they are statements that are nontestimonial. When
17 they were made, no one -- well, Mr. Perez didn't
18 think these would show up in court, so they're
19 nontestimonial statements.

20 THE COURT: So you're saying it makes you a
21 little nervous to rely on the co-conspirator, but it
22 doesn't make any difference, because it's going to
23 come under another exception?

24 MR. CASTELLANO: That's correct. I think
25 it could be a co-conspirator statement. The timing

1 is less clear. But I think under Smalls, it's still
2 going to come in.

3 THE COURT: Let me read it again as to --
4 it's down at the bottom. Where are you looking?

5 MR. CASTELLANO: They were asking why it
6 wasn't taken care of. This is in the middle of page
7 20558, DeLeon. And ultimately, the CHS says, "What
8 did 'Pup' say, because the (unintelligible) wasn't
9 done earlier?"

10 Mr. Perez says. "He didn't like it."

11 So, at some point, Mr. Baca has conveyed to
12 Mr. Perez -- or he's aware of Mr. Baca not being
13 happy with the fact that this murder didn't happen a
14 year earlier, as intended. So it's still talking
15 about the conspiracy. It's talking about the
16 conspiracy, having gone back a year, and nobody
17 following through on the order.

18 THE COURT: Okay. You think on that one
19 the age is a little fuzzy?

20 MR. CASTELLANO: It seems to me a little
21 bit. I think maybe the Court can make alternative
22 findings. It appears to be a James statement. But
23 if it's not, then it's covered by Smalls.

24 THE COURT: Okay.

25 MS. JACKS: Can I make a couple comments?

1 THE COURT: Well, Mr. Lowry was already up.
2 So I'll come back to you, Ms. Jacks.

3 Go ahead, Mr. Lowry.

4 MR. LOWRY: Thank you, Your Honor.

5 And I appreciate the comments by Mr.
6 Castellano.

7 But here's where I'm running on the shoals
8 of this analysis a little bit. And this is where --
9 why I started off my comments with the Court about:
10 Let's define the conspiracy we're talking about. And
11 I appreciate the Court's comments on that.

12 But my concern is that, if you assume --
13 and for the sake of this hearing and for the sake of
14 this argument let's assume that Mr. Baca is in a
15 leadership position, and let's assume that even these
16 statements could be attributed to him; that he's not
17 happy about how this happened.

18 And if you make those two assumptions, his
19 statements to Mr. Perez are about, We need to do
20 something about that. And that is a separate
21 conspiracy. And I understand what the Court said
22 earlier. Well, in the Court's mind, that could be a
23 conspiracy to cover up the Molina homicide.

24 But we can't just assume, by fiat, that a
25 potential conspiracy to cover up the involvement of a

1 previous murder made you a conspirator in that
2 murder. Because -- I think the Government said
3 this -- that there are certain rules that this
4 enterprise had that you needed to abide by. And that
5 conspiracy, the second conspiracy, could be
6 conspiracy to enforce the rules of the enterprise.
7 And it might not have had anything to do with being a
8 participant in the original conspiracy.

9 So I guess --

10 THE COURT: I well, I guess I'm struggling
11 a little bit with that. I mean, there is no evidence
12 that the men involved in this conspiracy wanted it to
13 be uncovered. In fact, it seems to me that part of
14 the conspiracy was covering cameras, throwing away
15 shanks, people having different tasks, paperwork
16 coming in, it's concealed. So there was a conspiracy
17 to conceal this murder.

18 MR. LOWRY: And I'm not going to --

19 THE COURT: I think you have to agree with
20 me that most of the time that outlasts the murder
21 itself.

22 MR. LOWRY: Well, I think there was --
23 certainly, you can look on the video and see people
24 discarding evidence into trash cans and things found
25 in the plumbing drains and that, so I'm going to

1 agree with you. But I don't know that the conspiracy
2 went so far, because I think the evidence is that
3 nobody did cover the cameras. So if other people --

4 THE COURT: Well, it may not have been
5 successful. But that doesn't mean that there is
6 still not a conspiracy for purposes of the hearsay
7 rule, right?

8 Isn't your better argument the one that
9 Mr. Castellano is handing you by saying that he's not
10 sure that I ought to rely on it here because of what
11 Ms. Bhalla is saying, is the dates on this particular
12 statement may not be staked out enough for taking Ms.
13 Bhalla's law, and maybe the ambiguity in this
14 particular statement that we can't fit it in, or
15 shouldn't fit it in under the co-conspirator, so then
16 you have a Smalls issue?

17 MR. LOWRY: And I agree with that, Your
18 Honor. And that's the argument.

19 THE COURT: So maybe on this one, I
20 shouldn't rely on co-conspirator. But I should say,
21 right at the present time, it comes in under the
22 Smalls, to solve any sort of Bruton problem, and it's
23 a statement against interests by Mr. Baca?

24 MR. LOWRY: And I think -- maybe I'm not
25 being as efficient with my language as I should be --

1 but this is my point: If it's a statement against
2 penal interests, it would be a statement against
3 penal interests regarding a different conspiracy.

4 And I think maybe --

5 THE COURT: We just don't have to get into
6 conspiracy. It's just murder.

7 MR. LOWRY: Well, it would be murder of
8 different people. It would be murder of people that
9 didn't cover up the camera.

10 THE COURT: But it doesn't matter, it's a
11 statement against interest, right? So I don't have
12 to figure out what murder it is. It's just people
13 don't go around making those statements. It's
14 against their penal interests.

15 MR. LOWRY: I think that has to be tied to
16 what interests we're talking about. But I'll go
17 back --

18 THE COURT: But if we've abandoned the
19 conspiracy, co-conspirators exception, then it's just
20 penal interests, I don't think it has to be quite as
21 tied.

22 MR. LOWRY: And, frankly, Your Honor, I'll
23 have to go back and look at that. Because I wasn't
24 prepared to argue the Bruton and Smalls issue today.
25 But I will.

1 But I think that that penal interest would
2 have to be -- and I understand we're going to have a
3 different point of view on this, of how closely that
4 penal interest has to be tied to the act of
5 conspiracy under indictment. And I think that's
6 where, analytically, we're on different pages. And
7 I'll come back to you on that.

8 THE COURT: If Mr. Baca just said something
9 just general: I could kill people because they
10 didn't handle this thing right, seems to me that that
11 is probably against penal interests.

12 MR. LOWRY: Yeah. But here's where, as a
13 matter of the credibility of this argument I'm really
14 struggling with, because, A, our argument is he
15 wasn't involved with the Molina homicide at all. And
16 there is even recordings with Mr. Duran where he's
17 complaining that, you know, everybody under the sun
18 is trying to wipe their ass with Mr. Baca. And I
19 think what we're seeing in the Molina homicide is
20 evidence of that.

21 But where I'm going with this is that there
22 are all these assumptions he wanted Mr. Molina dead.
23 And he lived with Mr. Molina from August of -- well,
24 January of 2013 into August of 2013, in the same pod,
25 in Southern, in the blue unit, where Mr. Molina

1 ultimately died. So I really have been struggling
2 with the credibility of these allegations, when, if
3 Mr. Baca really wanted Mr. Molina dead, he could have
4 done it himself when he was there.

5 THE COURT: If they get over the penal
6 interests, I don't have to make any findings by a
7 preponderance of the evidence. I simply have to find
8 that it's a 401 analysis, right?

9 MR. LOWRY: It would be -- well --

10 THE COURT: Does the evidence have a
11 tendency to prove what it's being offered for?

12 MR. LOWRY: It would be a statement against
13 penal interests from Mr. Baca to Mr. Perez. And then
14 we'd have to do the hearsay analysis from Mr. Perez
15 to Mr. Cordova.

16 THE COURT: But that's clear, right?

17 MR. LOWRY: Yeah.

18 THE COURT: It's not hearsay.

19 MR. LOWRY: It would be an admission as to
20 Mr. Perez.

21 THE COURT: Correct. And so, then, we have
22 to analyze the statements within Mr. Perez'
23 statements?

24 MR. LOWRY: Exactly.

25 THE COURT: Well, think about it. I think

1 it's coming in. But you're welcome to --

2 MR. LOWRY: I'm going to give it my best
3 shot to keep it out.

4 THE COURT: All right. Okay.

5 MR. CASTELLANO: And, Your Honor, no one
6 has briefed this yet, but if necessary, we could
7 provide a case. There is still some case law that
8 says you can do things after the conspiracy that
9 still show the conspiracy existed. So, in other
10 words, Mr. Baca is discussing the conspiracy after
11 the fact, which once, again, goes to establish that
12 the conspiracy was there. So --

13 THE COURT: I'd like to see that case.

14 MR. CASTELLANO: I'll pull something for
15 the Court.

16 THE COURT: Because a lot of evidence may
17 be more clearly classified as establishing the
18 existence of the conspiracy than it is going to be in
19 furtherance of the conspiracy. Those are not subsets
20 of each other. Those may be different things. A
21 statement could be either way, it could be used
22 either way, and fall into both. But they always
23 could be completely separate.

24 Ms. Jacks, you were up next.

25 MS. JACKS: I just have a couple of

1 observations. I guess, first of all, with respect to
2 the discussion about Perez relating that Baca was
3 angry or something about Baca. What I thought the
4 examination brought out of Agent Acee was that we
5 weren't -- he wasn't clear, and there wasn't -- it
6 wasn't clear -- that those were statements that were
7 in Perez' personal knowledge, that Baca actually said
8 that to him, or that that's something he heard, or
9 was repeating through basically a game of prison
10 telephone.

11 So I feel like that's a hurdle that hasn't
12 been jumped at this point. There is no -- I don't
13 think the Government has met its burden showing that
14 that, when Perez said that to Cordova, he was
15 reporting what Baca had said to him.

16 THE COURT: Why don't you put the statement
17 up there, and let's look at it, so we can drill down
18 on this.

19 MS. JACKS: I was reading off the actual
20 transcript of the hearing.

21 THE COURT: Oh, the hearing.

22 MS. JACKS: The hearing transcript is what
23 I've been referencing.

24 THE COURT: Why don't you borrow from Mr.
25 Lowry or Mr. Castellano the actual Perez transcript,

1 and we can look at it, and see if we've got -- if
2 your argument has some force here.

3 MR. CASTELLANO: 34A, I have 20558.

4 MS. JACKS: So I think the part, Your
5 Honor, that we were just talking about, where it
6 starts with Rudy, the part with the pink next to it,
7 "The old man was pissed bro."

8 THE COURT: Now, why do you -- when you
9 read that statement -- there may be some others, I
10 agree with you we may need to look at -- but why when
11 you read that do you not think that that's Mr. Perez,
12 with his personal knowledge, stating Mr. Baca was
13 very upset with the way this murder was handled?

14 MS. JACKS: Well, I guess for two reasons.
15 One is at the time of the homicide, Baca and Perez
16 were not housed at the same institution. And I don't
17 think there was evidence put in by the Government,
18 when they were in a position where they could have
19 had this discussion.

20 And then the other reason I think that is
21 because during the examination, Agent Acee was
22 specifically asked, both by myself and by Mr. Villa,
23 that specific question, whether he knew whether any
24 of these statements that Mr. Perez was saying were
25 things he knew firsthand, or things he was just

1 repeating. And he didn't. His answer was no, that
2 he didn't.

3 THE COURT: Let's assume that that's the
4 case, that we don't know. Does that necessarily mean
5 the evidence is kept out?

6 MS. JACKS: I guess what it means to me is
7 that there is a layer of hearsay, or potentially a
8 layer of hearsay, that's not accounted for by some
9 sort of exception. And if he is hearing it from
10 somebody else, I think the issue is: Who is that,
11 and is that person a member of the conspiracy, or is
12 he repeating something that somebody else told him?

13 THE COURT: Well, I think we had an
14 agreement earlier, the Government is not trying to
15 fit this into the co-conspirator statement.

16 MS. JACKS: I have two comments about that.
17 And maybe my brain just isn't functioning. But it
18 seems like, if that's an admission against Mr.
19 Perez --

20 THE COURT: No. It's an admission against
21 Mr. Baca, against his penal interests.

22 MS. JACKS: Oh, I guess I'm going two
23 levels. The justification for letting --

24 THE COURT: It comes in because it's an
25 admission against interests. It's a statement of a

1 party defendant. So it's not hearsay. It needs no
2 exception.

3 MS. JACKS: And I understand the Court's
4 analysis as to Mr. Perez. But what about to the
5 other defendants who didn't say that?

6 THE COURT: Then it's a Smalls issue.

7 MS. JACKS: Which you're talking about,
8 then, whether it's a declaration against penal
9 interests; correct?

10 THE COURT: As to Mr. Baca.

11 MS. JACKS: Well, I would think, isn't it
12 also a Smalls issue about whether Mr. Perez'
13 statement is a declaration against penal interests,
14 so that it comes in against the other defendants?

15 THE COURT: I don't need to analyze it.
16 It's nonhearsay, so it doesn't need an exception.

17 MS. JACKS: Well, that's where I'm just
18 sort of missing it. But I guess what the Court is
19 saying --

20 THE COURT: Well, under the definition of
21 hearsay, the statement of a party opponent is not
22 hearsay.

23 MS. JACKS: No, I agree with that. But
24 it's hearsay as to Mr. Sanchez, and he's not the
25 person that made the statement.

1 THE COURT: I would agree that it would
2 then implicate a Bruton issue, which then I think the
3 Smalls case deals with.

4 I think we had this conversation last
5 summer, or during the summer. And you're welcome to
6 correct me. But I mean, I think this is where we all
7 stared at the Tenth Circuit and said it resolved that
8 problem.

9 MS. JACKS: I remember that discussion.

10 So I guess the other thing I want to just
11 point out, this isn't the only statement that's
12 potentially Perez just spewing things that he's heard
13 from other people and not things he has personal
14 knowledge of. And I think there is a bunch of
15 statements in what's been offered by the
16 Government --

17 THE COURT: Why don't we take them one at a
18 time, and that's what we're here for is to look at
19 these one at a time, and analyze whether they're
20 coming in or not.

21 MS. JACKS: Well, let me pull up the
22 transcript, because that's how I've been looking at
23 these.

24 So the first one that I note is at Exhibit
25 16, Bates stamp 20540.

1 THE COURT: All right. Help me out on the
2 front page, Ms. Jacks. What is this document?

3 MS. JACKS: This is the Government's
4 Exhibit 16. And the Bates stamp at the bottom of the
5 page -- well, let me just be really specific. I'm
6 looking at the transcript of December 8, Volume 2, at
7 page 210. And in the record it's referenced as
8 Government's Exhibit 16, Bates stamped 20540 -- oh,
9 no, I'm sorry, its reference is Bates stamp 20540.
10 I'm looking at Mr. Castellano's exhibit here. And I
11 think that that had been subsequently marked Exhibit
12 31A.

13 Let's just put this statement up. And I
14 think, specifically, again, it's the one -- it's the
15 statement where the pink sticky note is here talking
16 about "Crocodile" and "BB" having to answer for never
17 doing the first paperwork that was sent down there.
18 There is no evidence that the Government has
19 presented that Mr. Perez had the ability to talk
20 specifically with "Crocodile" or "BB."

21 And I think again, the answer of Agent Acee
22 on the stand was that he didn't know what Mr. Perez
23 was talking about, whether that was from his personal
24 knowledge, or something he just heard through the
25 prison telephone.

1 THE COURT: All right. Mr. Castellano,
2 would you try to get this statement in through the
3 co-conspirator statement, or is it going to be back
4 to a statement against interests in a Smalls issue,
5 so we're not talking about a co-conspirator statement
6 here, we're talking about a Smalls issue?

7 MR. CASTELLANO: Yes, I think --

8 THE COURT: Would you want to defend me
9 letting this in on the co-conspirator statement
10 exception?

11 MR. CASTELLANO: I would defend it with the
12 secondary argument about --

13 THE COURT: You prefer the secondary
14 argument?

15 MR. CASTELLANO: Yes. I think the
16 secondary argument would be my stronger argument. I
17 will say -- and the Court may remember from
18 cross-examination of Mr. Perez last week -- I don't
19 have the transcript in front of me -- there is a
20 statement where Mr. Perez said "Pup," Mr. Baca, told
21 me. So there is evidence about direct conversations
22 between Mr. Perez and Mr. Baca. There is evidence
23 here. Because it's kind of behind the laptop, I
24 don't want to mess with it.

25 MS. JACKS: Here, I'll move it.

1 MR. CASTELLANO: We know there is evidence
2 from the transcripts themselves.

3 THE COURT: Okay. I wouldn't mind having
4 my memory refreshed on what he said. It might help
5 us with these arguments, if you have that available.
6 I'll come back to you.

7 MS. JACKS: I can provide an example. I
8 don't disagree that there may be some statements
9 where the Government did present testimony that Mr.
10 Perez heard it directly from Baca. But there are
11 certainly a lot of statements that they're offering
12 that don't contain that sort of evidence.

13 Let me -- I'll give you one in specific
14 that regards Mr. Sanchez. I'm at the same exhibit,
15 page 20550. In this case, there is a conversation
16 that starts about what "Dan Dan" and Mr. Perez are
17 talking about. And Mr. Cordova said, "That's what
18 'Dan Dan' asked you. When did he ask you that?"

19 THE COURT: Can you point it out to me,
20 Ms. Jacks?

21 MS. JACKS: Right here. I would agree that
22 that's evidence of a conversation between Mr. Sanchez
23 and Mr. Perez. So I guess what type of evidence I'm
24 asking for -- and I think we have a right to demand
25 from the Government -- is of this quality; not just

1 some -- something that could be passed along through
2 prison gossip.

3 THE COURT: Well, I don't know. I can be
4 educated on this. But it seems to me that, if the
5 Government has established that they had personal
6 communications, and then somebody testifies that this
7 is what -- let's just be specific -- if the
8 Government has established that Mr. Perez and Mr.
9 Baca had conversations, and then they also have
10 testimony that Mr. Baca or Mr. Perez says Mr. Baca
11 said this or did this, do I need more? That's a lot
12 of evidence.

13 MS. JACKS: I think each conversation, I
14 think has to be looked at independently.

15 THE COURT: But that would not be normal to
16 have a conversation, in which each person, each time
17 they say it, for them to give a date and time as to
18 when it occurred. I mean, I say, "My wife said
19 this." Now, I may have earlier in the conversation
20 said, "My wife said this yesterday on the telephone."
21 But I don't go back with each statement and reference
22 the exact conversation.

23 MS. JACKS: And I understand that. I guess
24 what I'm saying is, I think in this transcript, or in
25 this conversation, there do appear to be a lot of

1 things where Mr. Perez is simply repeating what he's
2 heard through the grapevine. And there is no -- we
3 know for a fact Mr. Baca and Mr. Perez were not in
4 the same custodial environment at or around the time
5 of the Molina homicide. So there really isn't a way
6 for them to be talking to each other directly.

7 THE COURT: And I think that Mr. Castellano
8 is trying to keep all of us out of the error by, on
9 some of these, conceding he's not very comfortable
10 with me trying to fit it in to the co-conspirator
11 statement. But then you're going to be looking at a
12 Smalls issue, and it's going to be coming in there.
13 So I'm wondering if, on some of these, it may be
14 somewhat irrelevant. I don't want to say
15 "irrelevant." That's not the word. What I mean, it
16 may only tell us which -- either it's an exception or
17 it's not going to be hearsay at all.

18 MS. JACKS: I think that --

19 THE COURT: So it may be coming in, you
20 know what I mean?

21 MS. JACKS: And it's very hard to talk
22 about this without zeroing in on a particular
23 statement. But I just wanted to make my point that I
24 think some of this is hearsay being repeated, and
25 there is not evidence that it came directly from a

1 co-conspirator --

2 THE COURT: Well, I think Mr. Castellano
3 will concede that, right? That's what I got from
4 your prior comments, you'll concede that probably
5 some of these statements, you'd prefer I not rely on
6 the co-conspirator statement to get them in, because
7 it would be tougher for you to defend that on any
8 appeal?

9 MR. CASTELLANO: Right. I think the Smalls
10 argument would be my stronger argument on appeal.

11 THE COURT: On some of these statements?

12 MR. CASTELLANO: Correct. And then, I
13 mean, we haven't gone there -- are other reasons this
14 could be relevant. It could be discussion about the
15 enterprise and identify the members of the
16 enterprise. And there are many other evidentiary
17 reasons why this could come into evidence. There are
18 plenty.

19 MS. JACKS: I just have a couple of general
20 categories that I just want to bring up, because I
21 felt they were offered as co-conspirator statements,
22 and I wanted to draw the Court's attention to them.
23 I think there were two statements that were offered,
24 or discussed, that were statements of Mr. Molina.
25 Obviously, he's not a member of the conspiracy. I'm

1 not quite sure what, if any, theory of admissibility
2 the Government is advancing for those.

3 THE COURT: Can you point those out to me?

4 MS. JACKS: So I think the first one was
5 discussed on November 28, at page 46 in the
6 transcript.

7 THE COURT: This would be Mr. Perez
8 stating --

9 MS. JACKS: This is testimony by, I think,
10 Agent Acee regarding -- or Agent Stemo -- regarding
11 statements of Mario Rodriguez. Let me just pull it
12 up, if there is an exhibit. I think this was Agent
13 Stemo. And I don't believe this was the -- was
14 addressed in a particular Government's exhibit. As I
15 recall, Agent Stemo had Mr. Rodriguez' 302 up there
16 with her when she was testifying. And that was
17 actually a document that, prior to that moment, had
18 not been provided to the defense. She was basically
19 just testifying to statements contained in that
20 document.

21 So I'm at page 46 of the transcript of the
22 hearing on November 28, 2017. And starting at line
23 4, she said, "Rodriguez" --

24 THE COURT: Now, you're looking at your
25 computer?

1 MS. JACKS: I am. I'm looking at the
2 transcript, which I have electronically.

3 THE COURT: Let me ask you this: Do you
4 have the 302 that we could put up?

5 MR. CASTELLANO: I might, Your Honor. I
6 think the statement she's referring to is when Mr.
7 Molina is downstairs, he says something like, Yeah,
8 you got me, Carnal. Mr. Rodriguez says, "You're no
9 carnal," words to that effect. But I can look for
10 the statement itself.

11 MS. JACKS: Actually, it's slightly
12 different. I think that's the other one. It's not
13 long. If I could just state it, maybe that would
14 refresh the Court's recollection.

15 THE COURT: You may.

16 MS. JACKS: Is that okay? So Agent Stemo
17 testified this, starting at line 4 through line 9 --
18 this is her answer to a question: "Rodriguez
19 overheard Montoya tell Molina to stay back, and
20 Molina did not."

21 THE COURT: Read that sentence again.

22 MS. JACKS: "Rodriguez overheard Montoya
23 tell Molina to stay back, and Molina did not." This
24 is the lead-up.

25 Then the next question was, "And when Mr.

1 Molina made a statement" --

2 THE COURT: You would agree there is no
3 problem with the first sentence; it's what you're
4 about to read me that's the problem?

5 MS. JACKS: My issue is Molina's statement.

6 THE COURT: All right.

7 MS. JACKS: Question: "And when Mr. Molina
8 made a statement that he was done, saying, 'Come on,
9 I'm done now,' what was Rodriguez' response to that?"

10 And the answer was he told Molina that he
11 was no carnal.

12 So I'm not clear if the Government is
13 trying to offer Molina's statement, "Come on, I'm
14 done now." But I think that's not a statement of a
15 co-conspirator.

16 THE COURT: Maybe I'm being dense. But
17 what is he trying to communicate, Molina?

18 MS. JACKS: Well, I would have to
19 speculate.

20 THE COURT: Speculate for me.

21 MS. JACKS: I think the speculation is:
22 You guys have stabbed me enough, leave me alone.

23 MR. CASTELLANO: I would agree with that
24 assessment. And I agree, it's also not a
25 co-conspirator statement we could offer for a

1 nonhearsay reason to provide context of what was
2 going on, especially because, in response to that
3 statement, Mr. Rodriguez makes an admission. I agree
4 it is not co-conspirator statement.

5 THE COURT: Well, I guess what I'd be
6 inclined to do on that is to tell -- boy, I guess I
7 would think that would fall into a present sense
8 something, being stabbed, and a statement that you
9 make there falls under one of those exceptions. So I
10 think it could probably come in there. Well, if it's
11 an exception, it's an exception. I think it's
12 probably going to fall within that exception.

13 MS. JACKS: And the other one I can't
14 locate immediately, but I'd have to take a look and
15 see if that would probably be the same analysis.

16 THE COURT: Okay. I guess if there are
17 statements by Molina at the time he's being stabbed,
18 they're probably coming in under one of those
19 exceptions. We can think about it a little harder.
20 And I can review the rules for each one of them. But
21 I would think they would probably fit into something.

22 MS. JACKS: The other category or type of
23 statements that I think were offered, that I'd just
24 like to take a minute to talk about, are statements
25 that, to me, sort of are not about the murder of

1 Molina, or the conspiracy to murder Santistevan or
2 Marcantel, but statements or puffery about prison
3 politics. And the one that's probably an example --
4 and I'm not saying this is the only one -- is it was
5 offered November 29. And I think it was through the
6 testimony of Agent Acee regarding conversations
7 between -- recorded conversations between Mr. Baca
8 and Mr. Duran. And I'm at transcript, on page 259.
9 It's the top of page 259 on the transcript. And I
10 don't think there is an exhibit that corresponds
11 directly to it. But --

12 THE COURT: Did you have 259 up, or was
13 that --

14 MS. JACKS: I'm reading off the transcript
15 of the hearing of November 29, at page 259, starting
16 at the top. And it's a statement of Baca that -- I
17 think Duran has initiated him into a discussion about
18 the Mexican Mafia. And Mr. Baca says, "Hell, yeah,
19 they are." "Pup" complains -- this is Agent Acee's
20 characterization -- "Pup" complains to the CHS that
21 "Dan Dan" is too quick to want to fall under the Eme,
22 which is the Mexican Mafia. "Pup" views the SNM
23 equal to the Eme or Mexican Mafia.

24 THE COURT: Hold on just a second. Let me
25 reread that sentence on the real-time. Do you want

1 to read it again? Read it real slowly, so maybe we
2 can get a real good transcription here.

3 MS. JACKS: So this is Agent Acee, and he's
4 saying, as an answer to the question, "Pup" responds,
5 quote, "Hell, yeah, they are." And then Acee gives
6 his interpretation of what that conversation was.
7 This is what I'm understanding the testimony to be,
8 "Pup" complains to the CHS that "Dan Dan" is too
9 quick to want to fall under the Eme. "Pup" views the
10 SNM and equal to the Eme.

11 THE COURT: Okay. Is this still Mr. Perez'
12 statements?

13 MS. JACKS: No, this is testimony of Agent
14 Acee about statements of Mr. Baca that were recorded,
15 or conversations of Mr. Baca and Eric Duran. And so
16 one of the things Eric Duran engages Mr. Baca in
17 conversation about is the Mexican Mafia, and the
18 standing of the SNM with the Mexican Mafia. And --

19 THE COURT: I'll let Mr. Castellano do his
20 own argument, but I would think that the way that
21 would be handled would be that -- I think we might
22 agree that that would not come under the
23 co-conspirator exception. But it is a statement by a
24 party opponent, and therefore, it's nonhearsay, the
25 statement itself, and it's relevant to the enterprise

1 or the furtherance of the enterprise's activities.

2 Let me stop there. Did you analyze it
3 differently? Remind me who is stating that Mr. Baca
4 said this?

5 MR. CASTELLANO: Yes, I'll put it on the
6 visualizer, Your Honor. It's on DeLeon 3307.

7 THE COURT: Who is the declarant, the first
8 declarant? Not Mr. Baca, but who is saying Mr. Baca
9 said this?

10 MR. CASTELLANO: So here, this is the
11 actual statement. It's 1168.010, in terms of the
12 recording. So Duran tells Mr. Baca that if Mario --

13 THE COURT: This is Duran recording Baca?

14 MR. CASTELLANO: Yes. So if Mario gets
15 caught -- as we recall, Mario was supposed to be
16 involved with the murder conspiracy -- and if he gets
17 caught, the news will get out that the SNM hit the
18 Secretary, then the Eme will look at the SNM
19 different. And as Ms. Jacks said, "Pup" responds,
20 "Hell, yeah, they are."

21 So it is related to the enterprise. It
22 relates to how they relate to other gangs --

23 THE COURT: So the analysis I gave would be
24 the one that you would advocate?

25 MR. CASTELLANO: Yes.

1 THE COURT: What do you see as the flaw in
2 that analysis, Ms. Jacks, if any?

3 MS. JACKS: Well, I guess where I would go
4 next, if that's the Court's analysis, is to say at
5 some point I think this is just getting over the top
6 in terms of the inflammatory nature of the comments,
7 and with very little probative value proving whatever
8 minor things the Government has to prove with respect
9 to the enterprise. So, at some point, I would say
10 that it should just be cut off.

11 THE COURT: Okay. So it's a 403 analysis.

12 MS. JACKS: Correct.

13 THE COURT: All right. Anybody else want
14 to take on some particular statements as being either
15 not co-conspirator -- were you getting your jacket on
16 to get up, Ms. Sirignano?

17 MS. SIRIGNANO: I am, Your Honor.

18 THE COURT: All right. So I'll get Ms.
19 Sirignano first, and then I'll come back to you, Ms.
20 Fox-Young.

21 MS. SIRIGNANO: Your Honor -- and I really
22 don't have a particular statement that I can
23 challenge right now. I just wanted to bring to the
24 Court's attention the argument that Ms. Jacks was
25 making. And this is the Alcorta case, at 853 F.3d

1 1123. And this page is 1137 --

2 THE COURT: Remind me of the argument
3 you're tying this case to that Ms. Jacks made.

4 MS. SIRIGNANO: Well, right there,
5 mid-page, talking about things that are heard as
6 gossip, things that are heard on the yard, things
7 that can't necessarily be attributed to one person.
8 And right where the Section 8, 9, 10 boxes are
9 starts, "Before admitting statements into evidence
10 under the co-conspirator exception to the hearsay
11 rule, the district court must determine by a
12 preponderance of the evidence that, 1, a conspiracy
13 existed, 2, the declarant and the defendant were both
14 members of the conspiracy, and 3, the statements were
15 made in the course of, and in furtherance of the
16 conspiracy." And they cite this Morgan case from the
17 Tenth Circuit in 2014. This is the same argument
18 that Ms. Bhalla was making earlier.

19 So starting here at this sentence, of
20 central importance here is the in furtherance
21 requirement of the Federal Rules of Evidence, which,
22 quote, "embodies the drafter's desire to strike a
23 balance between the great need for conspirators'
24 statements in combatting undesirable criminal
25 activity, which is inherently secretive and difficult

1 of prove, and the need to protect the accused against
2 idle chatter of criminal partners, as well as
3 inadvertently misreported and deliberately fabricated
4 evidence," end quote. And they cite this United
5 States v. Perez case. It's a Tenth Circuit 1993
6 case. And Mr. Castellano used this to show the Court
7 a wide array of statements can fit into this
8 requirement.

9 And then, at the bottom of the page,
10 starting at boxes 11, 12, and 13, it says, "The trial
11 court must state on the record its findings on the
12 elements of the co-conspirator exception," citing
13 Rascon, a Tenth Circuit case from 1993.

14 So, Judge, my argument is two-fold here.
15 One, I understand you're trying to ascertain if these
16 statements are co-conspirator statements or not,
17 which Ms. Jacks determined that some of them may not
18 be.

19 And secondly, the Court -- Tenth Circuit
20 requires that if it's coming in as a co-conspirator
21 statement, the Court must state on the record its
22 findings regarding each and every statement. So that
23 just concerns me a little bit, because I --

24 THE COURT: Well, I think you're adding a
25 little bit. I don't think it requires me to make

1 1000 findings. I mean, if I find generally that this
2 Perez transcript comes within the co-conspirator
3 exception, with the exception of maybe a few
4 statements, I think that's satisfying my task. It
5 doesn't say that I have to make it as to each and
6 every statement. It does say I have to make, on the
7 record, findings on the elements of the co-conspiracy
8 exception. I think I can -- for example, once I find
9 a conspiracy existed, once I find the declarant and
10 the defendant were both members of the conspiracy, I
11 think I have to be maybe a little bit more precise on
12 the statements were made in furtherance. But I can
13 take them as groups, wouldn't you agree?

14 MS. SIRIGNANO: I'm not so sure, Judge.
15 That's why I bring it to the Court's attention.

16 THE COURT: Well, if the defendants are not
17 going to take the time to point out specific
18 statements, I think it's a little hypocritical for
19 them to go to the Tenth Circuit and say I've got to
20 make a statement on each one that nobody even
21 challenged. So I guess I would push back on that.
22 That seems to me elevating a lot of form over
23 substance.

24 All right. Let's take our break for the
25 afternoon, then I'll pick up when you get back, Ms.

1 Sirignano.

2 (The Court stood in recess.)

3 THE COURT: We'll go back on the record.

4 Make sure that everybody has a lawyer. All right.

5 Ms. Sirignano, let's make sure that you and
6 I aren't speaking past each other. Let's slow down
7 here. And I think you and I can agree on this. And
8 this is maybe what you were saying and this is maybe
9 what I was saying, and I think maybe we're not as far
10 apart. I agree with you, I have an obligation on
11 every statement to say -- make those findings. I
12 think I have made those statements and findings as to
13 everything that I am calling in the James box for the
14 two conspiracies. So I did that at the beginning.
15 And then I invited the defendants to challenge, if
16 they saw some statements that -- I mean, there is a
17 lot of statements here, and so I'm trying to keep
18 them all straight in my head, and filter them through
19 the co-conspirator analysis. But I've made findings
20 as to everything that the Government has presented in
21 their James presentation. So I think I've made those
22 three.

23 What I was disagreeing with you, and I
24 don't think you're asking me to do this, is I take
25 every sentence and state it separately. I can take

1 boxes of materials and make those. If you think I
2 need to make it, then we'll have to disagree. But it
3 seems to me that then if y'all disagree with me, the
4 defendants agree on some statements, we need to do
5 like Mr. Lowry was doing, Ms. Jacks was doing, to a
6 certain degree, Ms. Bhalla, tell me, Hey, you've got
7 this one wrong. You've got to look at this
8 statement. And then I've got to either agree with
9 you, which I think Mr. Castellano and I have agreed
10 with the defendants on some, and then we have to
11 filter it or get it in, if it's going to come in at
12 all through some other exceptions. Would you agree
13 with that analysis?

14 MS. SIRIGNANO: One hundred percent.

15 THE COURT: All right. We're in agreement
16 then.

17 MS. SIRIGNANO: Thank you, Judge. I just
18 wanted to make the record on that because this
19 Alcorta case is very helpful.

20 THE COURT: What is the case you had up
21 there?

22 MS. SIRIGNANO: It's United States v.
23 Alcorta, A-L-C-O-R-T-A, 853 F.3d 1123. And I was
24 quoting from page 1137. And the court's discussion
25 bleeds onto page 1138, and the very beginning of

1 1139.

2 THE COURT: And is that a Tenth Circuit
3 case?

4 MS. SIRIGNANO: Yes, 2017. And it's Judge
5 Hartz.

6 THE COURT: Is that the same case you had
7 up, Mr. Castellano?

8 MR. CASTELLANO: Yes, I lent it to
9 Ms. Sirignano.

10 MS. SIRIGNANO: It's Judge Hartz' opinion,
11 Your Honor.

12 THE COURT: Okay.

13 MS. SIRIGNANO: So just to sum up, Judge,
14 my concern is that this case says that the Court went
15 through at the first James hearing, and the district
16 court judge in this case ruled that the Government
17 had showed by a preponderance of the evidence that
18 the conspiracy existed, and that it included the
19 defendants. And the court did question the parties
20 about how the specific conversations fit within the
21 co-conspirator exception. And if it didn't fit
22 within the co-conspirator exception, the Government
23 provided various rationale for the challenged
24 statements. And I understand we're doing that here.
25 But I do believe it's the Government's burden. If

1 the statements aren't coming in, based on the --

2 THE COURT: I don't disagree with you. The
3 burden remains regardless of the exception. They're
4 the proponent of the evidence so they have the burden
5 of proving its admissibility. The only thing I'm
6 trying to set up a mechanism for is I know y'all have
7 been struggling with it. Ms. Wild has been telling
8 y'all -- I'm just saying: Help me out. I'm making
9 my findings. I'm doing what I think the Tenth
10 Circuit requires me to do, and the Ninth Circuit
11 requires me to do. But after I make that, I'm still
12 giving y'all an opportunity to come back just like
13 Ms. Jacks was doing and Mr. Lowry was doing, Judge, I
14 think you've got it wrong on this one. And I'll
15 reconsider that and say, Yeah, you're right, it's not
16 in furtherance or yeah, the dates aren't precise.
17 And this is a lot of material for a judge to absorb.
18 And I'm quite willing to say, Hey, I don't think
19 you're right on this one; you know, I understand on
20 others, but this one you got it wrong.

21 And so that's -- but I agree with you the
22 burden always stays with the Government. But I've
23 got to have some help from the defendants, because
24 y'all are going to run the risk of waiving for an
25 appeal if you don't help me out to some degree

1 saying: That one you got wrong. So I think we all
2 are in the same box here. We've got to preserve our
3 objections; I've got to do my job, and the Government
4 has the burden of proof. So --

5 MS. SIRIGNANO: Thank you, Judge. That's
6 all I've got right now.

7 THE COURT: Do you have anything
8 specifically you want guidance or you want me to
9 reconsider or think about?

10 MS. SIRIGNANO: I'll just take the Mr.
11 Lowry and Ms. Jacks option. And if I -- Mr. Adams
12 and I believe that there is something that came in
13 wrong, we'll advise the Court in a letter.

14 THE COURT: All right. Take a look at it.
15 We've got boxes here of two conspiracies. If they
16 don't fit in there, you can say, Well, I don't think
17 it fits in, and then the Government is going to
18 probably have to show me how else it's going to --
19 how it's going to fit in.

20 MS. SIRIGNANO: Thank you, Judge.

21 THE COURT: Thank you, Ms. Sirignano.

22 Mr. Castellano, I'll ask you, since some of
23 these that we've been talking about this afternoon
24 you're relying on Smalls. On every one of the ones
25 that we had this afternoon in Smalls, are you -- let

1 me get the language to the rule so I can cite it to
2 you -- and then some of the defendants may have -- I
3 guess what I was going to ask you is: Where we have
4 this afternoon defaulted not to the co-conspirator
5 statement, but we have defaulted to the statement
6 against interests. The first requirement of that is
7 "a reasonable person in the declarant's position
8 would have made the statement only if the person
9 believed it to be true because, when made, it was so
10 contrary to the declarant's proprietary or pecuniary
11 interest or had so great a tendency to invalidate the
12 declarant's claim," that reasonable person in the
13 declarant's position, we're relying a lot on -- well,
14 I think I'm answering my own question. Because we
15 don't have to determine Perez' interests. What I was
16 thinking of is his is coming in because it's not
17 hearsay; it's a party opponent. So it's Baca's
18 interests that we're having to evaluate. And those
19 statements were against, those would not have been
20 made -- okay, I was thinking for a second, given the
21 testimony I heard, not in the James hearing, but in
22 the suppression motion, where he said he was lying.
23 But I don't think that's going to be relevant to
24 Baca's penal interests. So I think the Smalls
25 exception still works.

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1 You're probably going to tell me I'm right.

2 MR. CASTELLANO: I'm going to tell you
3 you're right, Your Honor. And that's what happened
4 in Smalls. We had a jailhouse informant, who said
5 that another person told me those things, and that
6 informant wasn't in harm's in terms of criminal
7 liability.

8 The only reason I came up --

9 THE COURT: The informant is sort of
10 irrelevant here, because we've got the tapes. So the
11 informant sort of falls out of the hearsay analysis,
12 and we're just analyzing Perez. Perez comes under
13 party opponent. And Baca comes in under the
14 exception statement against penal interests.

15 MR. CASTELLANO: Yes. And I think we've
16 covered the subjects. But I want to make sure we're
17 talking about multiple conspiracies. I think four
18 actually. One is the conspiracy to murder Javier
19 Molina. The next is the conspiracy to assault Julian
20 Romero. That's one we don't discuss very much, but
21 Mr. Baca is the only remaining defendant in that
22 count. There is a conspiracy there. And then a
23 conspiracy to murder Dwayne Santistevan. And a
24 conspiracy to murder Gregg Marcantel. I've generally
25 spoken about Santistevan and Marcantel together, but

1 they are two conspiracies.

2 THE COURT: Two conspiracies. Let's talk a
3 bit about that second one, because that one I've sort
4 of phased over a little.

5 MR. CASTELLANO: So we've talked about that
6 in passing, even when Mr. Roark was on the stand. So
7 when the SNM was locked down following the Molina
8 murder, eventually they decided to lift the lockdown.
9 And within hours, another person was assaulted, and
10 that was Julian Romero. And that resulted in the SNM
11 being locked down once again. And that is covered in
12 one of the plea agreements I referenced earlier. But
13 I'll give it back to the Court.

14 THE COURT: So I have this clearly in my
15 head, who are you saying -- what are you naming this
16 conspiracy?

17 MR. CASTELLANO: The Julian Romero assault.

18 THE COURT: And who are you including in
19 this conspiracy?

20 MR. CASTELLANO: This was a conspiracy
21 with, I believe, Gerald Archuleta, Conrad Villegas,
22 and Mr. Baca, among others.

23 THE COURT: So then what statement of those
24 co-conspirators are you trying to get in through the
25 co-conspirator exception?

1 MR. CASTELLANO: Let me see if I can find
2 that. First, is -- one was Lupe Urquizo, and I'll
3 give that to the Court in a second here. But in
4 terms of the conspiracy, Gerald Archuleta's plea
5 agreement indicates that -- on page 5 of his
6 agreement -- this is Government's Exhibit 14 -- "This
7 attack and hit had been approved by leaders of the
8 SNM Gang, including Anthony Ray Baca. As leader of
9 the SNM Gang in 2015, Baca was aware of the
10 outstanding green light and sanctioned it." There is
11 some evidence of the conspiracy there --

12 THE COURT: Who made that statement?

13 MR. CASTELLANO: That is Gerald Archuleta.
14 I'll put the plea agreement --

15 THE COURT: And he is one of the
16 conspirators in the Romero assault?

17 MR. CASTELLANO: Yes, he was. So in terms
18 of background, one of the things that causes some
19 divides in the gang were that -- maybe as far as
20 2003 -- Gerald Archuleta was in prison, if I recall
21 correctly. He allowed Julian Romero to stay at his
22 house. And he ended up sleeping with Gerald
23 Archuleta's wife, or girlfriend. So, from that time
24 forward, there was an ongoing conspiracy to murder
25 Mr. Romero. And in 2003, he was actually shot as

1 part of that conspiracy. And the conspiracy remained
2 outstanding up until the time he was assaulted. And
3 that's referenced on pages 4 and 5 of Gerald
4 Archuleta's plea agreement.

5 And let me get the statement real quick, at
6 least some of them. I believe one we introduced at
7 the hearing, at least as related to Lupe Urquizo, is
8 that "Anthony Ray Baca told Mr. Urquizo to let the
9 shot callers at Southern know that Baca wanted Javier
10 Molina hit."

11 The next statement was that, "Baca told
12 Urquizo to make sure the guys running Southern took
13 care of Molina."

14 The next statement is that, "Baca told
15 Urquizo if you guys down there don't handle it, then
16 just stab him," referring to Molina -- I'm sorry,
17 that's Molina -- I apologize, those are related to
18 Mr. Molina. The two statements we have from Mr.
19 Urquizo are that "Mr. Urquizo and Jonathan Gomez told
20 Conrad Villegas to hit Julian Romero." And the next
21 one was that, "Anthony Baca sent down word to
22 Southern that Romero should be beat but not stabbed
23 or killed." And ultimately that's what happened.
24 Those are at least two of the statements I can find
25 right offhand that we introduced related to the

1 Julian Romero beating or assault.

2 THE COURT: All right. Did you want to say
3 something, Mr. Lowry?

4 MR. LOWRY: Just a point of clarification,
5 Your Honor. And this is going to go back. So I take
6 on the representations now they're not two
7 conspiracies, but four conspiracies that we're
8 talking about. But this point with the Julian Romero
9 statements, if I recall Agent Acee's testimony
10 correctly, Mr. Urquizo claims that he was told by
11 Jonathan Gomez about Mr. Baca's statements.

12 THE COURT: Well, let me ask this: That
13 statement of Mr. Urquizo was offered only to prove
14 for purposes of the James hearing that a conspiracy
15 existed, and who was a member of it. It's not a
16 statement that you're trying to fit in as a
17 co-conspirator statement for purposes of the
18 exception? Am I understanding the Government's
19 position correctly, Mr. Castellano?

20 MR. CASTELLANO: The first statement. Yes,
21 it wouldn't come in, well, directly.

22 THE COURT: The first statement --

23 MR. CASTELLANO: Yes, the first statement
24 is an admission by Mr. Urquizo that he and Jonathan
25 Gomez told Conrad Villegas to hit Julian Romero. In

1 fact --

2 THE COURT: That is not -- you're not
3 trying to fit that in a co-conspirator statement?
4 Because Urquizo is not a co-conspirator in this one,
5 right?

6 MR. CASTELLANO: He would be an uncharged
7 co-conspirator. He's not charged with that. But he
8 admits that he and Jonathan Gomez told Conrad
9 Villegas to hit Julian Romero. But that would come
10 in through Urquizo on the stand.

11 THE COURT: Okay. So there is no hearsay
12 problem, because he's here, and he made that
13 statement then to -- well, he made that statement to
14 who?

15 MR. CASTELLANO: To Conrad Villegas, who
16 ultimately assaulted Julian Romero.

17 THE COURT: Who is part of the conspiracy?

18 MR. CASTELLANO: Yes.

19 THE COURT: And he's saying that Mr. Baca
20 said that to him?

21 MR. CASTELLANO: Well, a separate statement
22 is attributed, and that's that Mr. Baca is the one
23 who sent word down to Southern that Romero should be
24 beat, but not stabbed or killed. So Mr. Baca is
25 modifying that order. The original order for Mr. --

1 "Styx," Gerald Archuleta, was that he should be
2 killed, referring to Julian Romero. Mr. Baca
3 modifies that by saying, "He should be beat up, but
4 not stabbed or killed."

5 THE COURT: Well, help me analyze it. The
6 statement that Mr. Urquizo is going to make on the
7 stand, I don't need the co-conspirator exception.
8 The co-conspirator exception that you need is where?

9 MR. CASTELLANO: Actually, I think you're
10 right, Your Honor. I'm not sure we need it for that
11 purpose as a co-conspirator statement.

12 THE COURT: Okay. So if I don't need
13 Urquizo, if that statement doesn't need to fit into
14 an exception, then do you see any problems with now
15 the co-conspirator statements that the Government is
16 trying to get in in the Romero box?

17 MR. LOWRY: Well, going with the Court,
18 what's the theory of admissibility? I'm not quite
19 sure --

20 THE COURT: Well, if Urquizo is on the
21 stand, you don't need any exception. There is no
22 hearsay there, because it's going to be an in-court
23 statement being offered for the truth of the matter.

24 MR. LOWRY: And my understanding was --

25 THE COURT: But he's going to be testifying

1 about what Baca said.

2 MR. LOWRY: And that's my point, Your
3 Honor. That's not what my understanding from the
4 testimony was. My understanding from Agent Acee's
5 testimony is that Mr. Urquizo will testify about what
6 Jonathan Gomez told him that Anthony Baca told
7 Mr. Gomez. And I think --

8 THE COURT: Well, is Gomez part of the
9 Romero conspiracy?

10 MR. CASTELLANO: Jonathan Gomez is, I would
11 say part of the conspiracy, but he is not charged.
12 And my notes could be wrong here. We could go back
13 to the transcript about what Agent Acee said.

14 MR. LOWRY: And the reason this stands out
15 to me -- well, Mr. Castellano is looking at the
16 transcript, Your Honor -- is when I was asking Agent
17 Acee on the stand: Okay, Urquizo attributes this to
18 Mr. Gomez. You interviewed Mr. Gomez. What did
19 Mr. Gomez say? And this is where Agent Acee said,
20 "Well, he danced around it. He never answered." And
21 I had to press Mr. Acee. And under cross, Mr.
22 Acee -- I think the transcript will reflect that he
23 said Mr. Gomez never affirmed that representation
24 made by Mr. Urquizo. So I'm having a break in the
25 chain of the hearsay statements, or however we want

1 to characterize them.

2 THE COURT: Do you have the transcript that
3 we can pull it up and take a look at it?

4 MR. CASTELLANO: I don't have it available,
5 Your Honor.

6 THE COURT: Do you have that, Mr. Lowry, or
7 Ms. Duncan?

8 MR. LOWRY: I do, Your Honor. Your Honor,
9 I'm looking at Volume 1 of the transcript from
10 November 27, 2017.

11 THE COURT: Are you able to put that on the
12 screen for me?

13 MR. LOWRY: I will, Your Honor. It's on
14 page 153, if I have this correctly. This is 153, I
15 have it highlighted here. So that's what I'm saying
16 here, "Word had come down" -- this is Agent Acee's
17 testimony -- "Word had come down via Jonathan Gomez
18 that they were to hit Julian Romero."

19 THE COURT: And your problem -- go ahead
20 and say it for me -- make your argument -- your
21 problem with that statement coming in the
22 co-conspirator is what?

23 MR. LOWRY: Well, other than this is the
24 first I'm hearing -- well --

25 THE COURT: That Jonathan Gomez was part of

1 the conspiracy?

2 MR. LOWRY: A member of the conspiracy.

3 THE COURT: Well, assume that they can --
4 well, let's -- let's ask Mr. Castellano this: What
5 proof do I have at this point that Mr. Jonathan Gomez
6 would be a conspirator here, indicted or unindicted?

7 MR. CASTELLANO: Let me check with Agent
8 Acee real quick, see if he recalls, Your Honor. And
9 I'll see if I have another report.

10 THE COURT: All right.

11 MR. LOWRY: And I don't want to get stuck
12 on the shoals of credibility again. But you can see
13 where I'm having an issue with this, if Mr. Gomez is
14 not saying that this statement was made. Again, it
15 comes back to sort of an ongoing --

16 THE COURT: Well, they have the burden of
17 proving that Mr. Gomez was a conspirator. So I think
18 they're shouldering that burden, and wondering if
19 they have put in evidence that makes this --

20 MR. CASTELLANO: I'm going to try to write
21 this down, Your Honor, as exact as I can get it.

22 MR. LOWRY: And, Your Honor, just for the
23 sake of the exercise, I think one of the things
24 you've seen all the parties struggling with this
25 afternoon -- and I understand the way the hearing

1 unfolded, but nobody has a complete set of the
2 exhibits. And if we could get, at the end of the
3 day, a complete set of the Governments exhibits so we
4 can be pinpoint accurate if we have any questions.

5 THE COURT: You want the Government's
6 exhibits?

7 MR. LOWRY: That are up here, just a copy,
8 a set. I mean, they referred to them in the record,
9 and that's why we're looking at the transcripts
10 instead of having an actual set. And just the number
11 of defendants -- I think the parties didn't make full
12 sets of exhibits for everyone. And if we could just
13 make a copy of what the Court has on record, that
14 would be most helpful for this exercise, Your Honor.

15 THE COURT: How do you want to do that,
16 Mr. Castellano? It doesn't have to be today, but I'd
17 like to get a set back with me in Albuquerque. Do
18 you want to let Mr. Lowry have a set of the exhibits?
19 He can make copies of them, and then get them back to
20 Ms. Standridge, and then she can get them up to me in
21 Albuquerque. Is that okay?

22 MR. CASTELLANO: The only set of exhibits I
23 have are here. And some of the testimony came from
24 the officers refreshing their recollection from
25 reports. Those did not become exhibits. If you

1 recall, a few times we lent those to the defense to
2 review during breaks. So those weren't exhibits.
3 The exhibits here are the plea agreements.

4 I want to say, the summary I've been using
5 was introduced at one point. I'll see if it's up
6 here.

7 THE COURT: Let me see if I have -- I think
8 what Ms. Wild is saying is identify for the Court
9 what copies you want. I think, at this point, I
10 probably better hang onto them. So tell Ms.
11 Standridge what copies you want. We'll make copies
12 and we'll hand them back to you.

13 MR. LOWRY: I'll do that, Your Honor.
14 Thank you.

15 THE COURT: Let me just look up here and
16 make sure that I don't have more exhibits. Ms.
17 Standridge, do you have the exhibit numbers? You're
18 not interested in any of the defendants' exhibits?
19 Because I have a stack of those.

20 MR. LOWRY: No, Your Honor, I'm not. And
21 if I help narrow this for everyone concerned, what
22 I'm really looking for are the Government's exhibits
23 that were in the form of transcripts or the
24 recordings summaries that were used with Agent
25 Acee's.

1 THE COURT: Does that stack have anything
2 you're looking for?

3 MR. LOWRY: Yes, Your Honor, it does. And
4 I think this may be the majority of it. But I'll go
5 back to the record and look.

6 THE COURT: All right. Just identify
7 before you leave today with Ms. Standridge what
8 copies you want. I'll keep the exhibit set, and then
9 she'll make you a set of copies and get them to you.

10 MR. LOWRY: Thank you, Your Honor.

11 THE COURT: All right. Mr. Castellano, if
12 you have something you want to say further on the
13 Romero, then I want to go back to some of these
14 Smalls issues that -- I want to cover some of the
15 ones that we've identified here, that the defendants
16 have raised that they may have problems with
17 co-conspirator. Then we were looking at Smalls. So
18 I want to come back to that issue. But why don't we
19 finish up with Romero before we do.

20 MR. CASTELLANO: In Romero, looking at
21 Exhibit 14, which is Gerald Archuleta's plea
22 agreement, just to go back to establishing the
23 conspiracy, and that Mr. Baca was a member of the
24 conspiracy, that's on the top paragraph of page 5,
25 indicating that, "The hit had been approved by

1 leaders of the SNM Gang, including Anthony Ray Baca."

2 THE COURT: And this document that I'm
3 looking at is whose plea agreement?

4 MR. CASTELLANO: This is Gerald Archuleta.
5 It's Government's Exhibit 14. So Archuleta was a
6 member of that conspiracy, and he agreed that he
7 conspired with Mr. Baca and others.

8 And related to the --

9 THE COURT: Can you put that back up there?

10 MR. CASTELLANO: Yes.

11 THE COURT: What other -- does he identify
12 the others?

13 MR. CASTELLANO: On page 4, there is a 2003
14 Shooting of Julian Romero. I believe that was
15 Federico Munoz who did that, and maybe another person
16 was with him. That went back to 2003.

17 And then, in 2005, it just indicates that
18 another member or associate of the SNM acted on the
19 hit, and that would refer to Conrad Villegas, was the
20 person who ultimately acted and assaulted Mr. Romero.

21 THE COURT: Okay.

22 MR. CASTELLANO: Then related to the
23 statements --

24 THE COURT: So you're offering this to
25 prove who was in the conspiracy?

1 MR. CASTELLANO: Correct. So we have to
2 prove the existence of the conspiracy. In this case,
3 the remaining defendant in that conspiracy is Mr.
4 Baca, so to establish his membership in the
5 conspiracy.

6 Then going back to the statement by Mr.
7 Urquizo. There is an indication that he and Jonathan
8 Gomez told Conrad Villegas to assault Julian Romero.
9 So that would be one statement, those two instructing
10 Conrad Villegas to assault Julian Romero. Then Gomez
11 indicated to Urquizo that Mr. Baca sanctioned the
12 hit, but he only wanted him smashed; he did not want
13 him stabbed or killed, referring to Julian Romero.
14 So the other statement would be Mr. Urquizo telling
15 the jury that Mr. Gomez told him that Mr. Baca only
16 wanted the victim smashed or beat up, but not stabbed
17 or killed.

18 THE COURT: You say there is an indication
19 that he, Mr. Urquizo, and Gomez told Conrad Villegas
20 to assault Romero. So that would be one statement.
21 Do we need -- if Urquizo is part of the conspiracy,
22 what evidence do I have at this point that Urquizo is
23 part of the conspiracy?

24 MR. CASTELLANO: Urquizo's admission. He
25 admits that he and Jonathan Gomez instructed Conrad

1 Villegas to assault Mr. Romero.

2 THE COURT: And that's Mr. Urquizo's own
3 statement?

4 MR. CASTELLANO: Yes.

5 THE COURT: So what do we need Jonathan
6 Gomez at all for? It seems to me that it may be
7 difficult for the Government to get Jonathan Gomez.
8 I don't think there is maybe enough here for me to
9 find that Gomez is a member of this conspiracy. And
10 then, if that's the case, it seems to me it's
11 irrelevant what Gomez said to Villegas. And it may
12 be difficult to fit that into the co-conspirator's
13 statement. Your thoughts on that?

14 MR. CASTELLANO: Mr. Urquizo and Mr. Gomez
15 both told Conrad Villegas to commit the assault.

16 THE COURT: But it sounds to me like I've
17 got Urquizo coming in and saying that he told
18 Villegas to assault. What do I gain by getting Gomez
19 in the picture?

20 MR. CASTELLANO: Because Gomez is the one
21 who tells Urquizo that Mr. Baca only wanted the
22 victim assaulted, not stabbed or killed. So what
23 Mr. Gomez is doing is providing instructions to Mr.
24 Urquizo that Mr. Baca sent down when that assault was
25 going to occur.

1 THE COURT: Okay. So let me make sure I
2 understand. I'm using Urquizo's statement to prove
3 both that Gomez is a member of the conspiracy to
4 assault Romero, and that -- well, that Gomez was part
5 of it, and then there was a conspiracy, and I'm using
6 the same statement to show that it was in furtherance
7 of the conspiracy?

8 MR. CASTELLANO: Correct.

9 THE COURT: Okay.

10 MR. CASTELLANO: In other words, Mr. Gomez
11 would be identifying other members of this
12 conspiracy, to include Mr. Baca. And identifying
13 other members of the conspiracy is in furtherance of.

14 THE COURT: Mr. Urquizo would be doing
15 that, is that what you said?

16 MR. CASTELLANO: Well, yes, Mr. Urquizo.

17 THE COURT: You said "Mr. Gomez," but I'm
18 not having Mr. Gomez speak. Where is he speaking
19 other than to he told Villegas?

20 MR. CASTELLANO: Correct. He does two
21 things. Mr. Gomez, along with Mr. Urquizo, first
22 instructs Mr. Villegas to commit the assault. And
23 then Mr. Urquizo tells us that he got word through
24 Mr. Gomez that Mr. Baca wanted this only to be an
25 assault. So Mr. Urquizo is relaying a statement by

1 Mr. Gomez, identifying himself as a conspirator and
2 Mr. Baca as another conspirator.

3 THE COURT: Okay. What do you see as the
4 flaw, if any, on that, Mr. Lowry? It looks like
5 they've got enough for me to find by a preponderance
6 all three of the elements on the Romero, and get the
7 Baca statements in.

8 MR. LOWRY: Well, Your Honor -- I would
9 agree with Your Honor, if we assume Jonathan Gomez is
10 a member of the conspiracy.

11 THE COURT: Well, do you agree with me --
12 and I think this is a principle that I can use --
13 that's the reason I was asking Mr. Castellano.
14 Because it seems to me the critical statement is that
15 Urquizo -- let me see if I can find it -- so Urquizo
16 said that he and Gomez told Villegas. So I can get
17 Urquizo's statement in. Like I said, just drop out
18 Gomez for a second, drop him out. So it's just
19 Urquizo telling Villegas to go assault Romero. And
20 then Urquizo can then -- and that statement would be
21 in furtherance of the conspiracy. It would show
22 there is a conspiracy, because he's saying Baca said
23 it. And it would indicate that he and Mr. Baca were
24 members of the conspiracy. And then, if I had a
25 Mr. Gomez -- then Urquizo is establishing

1 Mr. Gomez -- there is already a conspiracy -- now
2 that he's a member of the conspiracy and that he is
3 acting in furtherance of the conspiracy. So it seems
4 to me I can use the statement for multiple purposes,
5 and therefore, establish that Mr. Gomez is, by a
6 preponderance of the evidence, is both a member --
7 that the conspiracy exists; he's a member of the
8 conspiracy, and that the statements Mr. Gomez made
9 were in furtherance of the conspiracy. So, yes, it's
10 not an assumption. I have to make a finding on that
11 that I can use a statement. I can use the -- I can
12 use as evidence the statement itself that's being
13 used to find the three elements of the co-conspirator
14 exception.

15 MR. LOWRY: That's a lot of work for just
16 the statement itself. And I'm not --

17 THE COURT: But it's only a single
18 statement coming in, too. So it's not carrying the
19 weight of a lot of things like in the other
20 conspiracies, where a lot of statements were coming
21 in. It's one coming in here.

22 MR. LOWRY: Well -- and I guess what I
23 would suggest, you know, the standard would ask the
24 Court to look for evidence of corroboration with
25 that. And that's why I asked Mr. Acee. And what I

1 have on the Elmo is the direct --

2 THE COURT: Well, isn't the corroboration
3 going to come in -- I'm sorry, who is coming on the
4 stand? It's Romero -- not Romero. It's --

5 MR. LOWRY: Urquizo.

6 THE COURT: Is it Urquizo or Gomez?

7 MR. CASTELLANO: It's Urquizo, Your Honor.

8 THE COURT: So Urquizo is going to come in
9 on the stand. The fact he's here going to state
10 these things under oath, isn't that going to be some
11 additional indication of trustworthiness?

12 MR. LOWRY: Your Honor, if you look at the
13 pattern instructions on the credibility of
14 informants, I think what the instructions will tell
15 the jury, ultimately, is we're to treat their
16 credibility with a high degree of suspicion. And I
17 would encourage the Court to do so as well,
18 especially in this analysis.

19 Because what Agent Acee had said, when I
20 asked him on this page, and this is page 206 of the
21 transcript, from November 27, 2017, is that he did
22 try to corroborate this statement, and he was
23 unsuccessful in doing so.

24 THE COURT: Where do you get the standard
25 that -- and I'm not sure exactly what you said, but I

1 think you said that: What I am told to do is to
2 treat something with a high degree of suspicion?
3 What was your word?

4 MR. LOWRY: The pattern instructions, I'm
5 thinking of the ones I've read from the Ninth
6 Circuit. But to say to the jury in the ultimate set
7 of instructions that we'd like to have the Court
8 read -- and obviously, we'll debate that at a later
9 point -- is that one should consider informants,
10 snitches, however you want to describe it, with a
11 certain degree of suspicion. Those are my words.

12 THE COURT: And you think I should use the
13 same standard?

14 MR. LOWRY: I'm sure the law doesn't
15 obligate you to use that standard. But if we're
16 talking about corroboration of his statements, and
17 we're just resting sort of -- you know, pulling his
18 statements up by themselves on their own merit, as I
19 told the Court earlier, I'm a bit of a skeptic when
20 it comes to the Government's evidence, and I'm not
21 going to yield on this particular statement.

22 So when I try to assess whether the
23 Government had corroborated Mr. Urquizo's statements,
24 we get: He didn't do that. And this goes a little
25 bit further than that. If we look from page 206 to

1 207, Agent Acee described Mr. Gomez' briefing to him.
2 And that he says, essentially -- I'll paraphrase
3 this, and the Court is welcome to read it -- but: We
4 don't listen to Mr. Baca, you know. And that's what
5 we see here on line 21 of page 207. "We don't always
6 follow the orders."

7 THE COURT: And help me out. From that,
8 your argument would be what?

9 MR. LOWRY: Well, that you can't -- we're
10 relying completely on Mr. Urquizo's statements that
11 Mr. Baca was involved; had sanctioned this rough-up
12 of Mr. Romero. And what I'm suggesting to the Court
13 is Mr. Urquizo had a lot of motivation to credit
14 someone else with this, especially Mr. Baca, because
15 the Government is, you know, offering considerable
16 benefits to individuals that are willing to implicate
17 Mr. Baca in all manner of criminal conduct. And Mr.
18 Urquizo is no exception to that.

19 So here we have Mr. Urquizo, with some
20 degree of motivation, to corral Mr. Baca into a
21 conspiracy that Mr. Archuleta will say -- I would
22 imagine he'll say that he initiated. I think it's
23 important for the Court to understand that, in Mr.
24 Archuleta's plea agreement, which we just examined
25 with the Government, he's talking about things that

1 happened in 2003, 2004, 2005, all of which
2 incorporated a period of time where Mr. Baca isn't
3 even in New Mexico. He's been in Nevada serving time
4 since 1997; doesn't return to New Mexico until 2008.

5 So the idea that Mr. Baca was part of some
6 tabla or some organization that got together and
7 conspired to authorize Mr. Romero to be killed is,
8 again, I guess, from what I understand the Court's
9 leanings, you might consider that a credibility
10 issue. But I think when we're looking for evidence
11 of corroboration about the merit of Mr. Urquizo's
12 statements, I think that's other evidence that the
13 Court could consider, and should consider.

14 THE COURT: Okay. If I do that, though,
15 should I also consider evidence that I have from a
16 number of sources that Mr. Baca was the leader and
17 did give orders? I mean, not rely just upon this one
18 statement that -- but also everything else I've
19 heard, that Mr. Baca does -- is the leader, was the
20 leader, and did give orders, and many of those orders
21 were carried out.

22 MR. LOWRY: I think the Court could use
23 everything that the Court has heard in the last weeks
24 of motions hearings. I wouldn't argue against that.
25 But this is why --

1 THE COURT: Tell me, though, on this
2 particular point, whether he -- whether Mr. Baca was
3 in control, wasn't in control, people followed his
4 orders, didn't follow. Tell me what element of the
5 hearsay exception this goes to.

6 MR. LOWRY: Well, what I'm suggesting to
7 the Court is that United States is trying to say that
8 Mr. Urquizo is part of a conspiracy that includes Mr.
9 Baca. And Mr. Urquizo is telling Agent Acee: I'm
10 not part of Mr. Baca's branch, for the sake of
11 argument here. Mr. Urquizo is saying, Look, we don't
12 follow Mr. Baca, we don't follow his directives. So
13 if one doesn't follow one's directives, I find it a
14 bit difficult to say: I conspired with you, if we
15 don't agree on anything.

16 THE COURT: But isn't here, there was an
17 assault carried out?

18 MR. LOWRY: Apparently so. It's on video,
19 Your Honor.

20 THE COURT: So --

21 MR. LOWRY: The question would be why was
22 that assault carried out? And I think the Government
23 just stated it quite clearly. The assault is carried
24 out because Mr. Romero slept with Mr. Archuleta
25 (sic), who is a Government witness.

1 THE COURT: So you're arguing that the
2 Government has not proven that there is a conspiracy
3 that includes Mr. Baca?

4 MR. LOWRY: Correct. And I would submit
5 that the Government has tendered evidence from the
6 cooperating witnesses that Mr. Baca is allegedly
7 involved. And again, that's why I'm asking the Court
8 to consider as part of analysis where the witnesses
9 may have had some motivation to implicate others,
10 when that may not, in fact, have been true.

11 I mean, the fact of the matter is -- what
12 I'm hearing the Court suggest is Mr. Baca was the
13 leader; Mr. Baca ordered this; Mr. Baca ordered that.
14 And if Mr. Baca -- what we've suggested to the Court
15 since this case began -- if Mr. Baca was so clearly
16 the leader of the SNM, you know, he's put in Level 6
17 repeatedly by individuals. And we suspect, and the
18 Government hasn't confirmed this yet because we're
19 still working on identifying confidential human
20 sources within STIU, that those individuals placed
21 Mr. Baca in Level 6 because the organization
22 allegedly abandoned him as the leader.

23 THE COURT: All right. So that's the
24 element you're attacking there?

25 MR. LOWRY: Yes, Your Honor.

1 THE COURT: All right. Anything else on
2 this one, Mr. Lowry?

3 MR. LOWRY: No, Your Honor.

4 THE COURT: Thank you, Mr. Lowry. Do you
5 want to respond on this one, Mr. Castellano?

6 MR. CASTELLANO: Yes, Your Honor.

7 If the Court is looking to other evidence,
8 I'm going back to Rudy Perez' -- one of his
9 statements, which is DeLeon, 20540. This is one of
10 the statements where Mr. Perez claims to have heard
11 directly from Mr. Baca. "I heard 'Pup' say they have
12 to answer for that no matter how close I am to them.
13 They have to be account." And this has to do with
14 them not following through with the hit.

15 So there are times when people don't obey
16 orders. But at some point Mr. Baca has told Mr.
17 Perez that there will be repercussions for those
18 people. But certainly those people can disobey, but
19 it doesn't mean there will not be consequences. So
20 there is indication that people obey orders, and
21 sometimes they don't, and there will be
22 repercussions.

23 The other thing in terms of corroboration,
24 is that the assault itself is corroboration, because
25 Mr. Romero was, in fact, assaulted, but not stabbed

1 or killed. And in the transcript that Mr. Lowry
2 showed the Court, there is no indication that
3 Mr. Gomez, Jonathan Gomez -- he didn't say that it
4 didn't happen. He said he danced around it. And so
5 he didn't quite -- the answer to that question was
6 not no. He just didn't really want to answer that
7 question. So the evidence we have is that Mr. Baca
8 did approve it; that the approval came through
9 Mr. Gomez, and ultimately through him and Mr. Urquizo
10 for the assault to occur.

11 I don't have anything further on that
12 unless the Court has questions.

13 THE COURT: All right. I don't believe I
14 do.

15 I think specifically as to Romero, I'm
16 going to find that there is, by a preponderance of
17 the evidence, evidence that a conspiracy existed. I
18 don't think that there is much dispute on that. The
19 question is whether or not Mr. Baca was a part of it,
20 being a declarant.

21 And I think finding by a preponderance of
22 the evidence there is evidence that -- quite a bit
23 that we've heard and I've read -- that he is the
24 leader, or at least at one time was acknowledged as
25 the leader of the SNM Gang; that his orders were sent

1 down and carried out. There may be times when he
2 didn't, when they weren't carried out. But I don't
3 think that that's the element of the hearsay
4 exception. And I do think this was in furtherance of
5 the conspiracy, how it would be taken care of,
6 limitations on it. I think those were part. So I do
7 think these statements in the Romero box, the
8 conspiracy, do satisfy the hearsay exception. And so
9 I will admit them.

10 Let me now say for all four conspiracies --
11 because I do want to take what Ms. Sirignano said
12 seriously -- for all four conspiracies I am finding
13 that the statements that have been identified in the
14 four conspiracies by the Government do come within
15 the hearsay exception. I do think that they -- the
16 Government has established the four conspiracies. I
17 think they have satisfied the members of it and the
18 declarants are members of that conspiracy, and that
19 the statements were made in furtherance of the
20 conspiracy.

21 We have, this afternoon, identified a few
22 statements that either lacked dates and specificity,
23 that I will not rely on the hearsay exception for
24 co-conspirators. And for those that we identified
25 this afternoon, I will be relying upon either present

1 sense for Mr. Molina's stabbing, or statements
2 against interests, or the person is testifying, the
3 first declarant is testifying. But I will not be for
4 those that we identified and found alternatives for.
5 Those will be coming in, but they'll be coming a
6 different way.

7 With one caveat -- and I now want to ask
8 the Government to help me because this was some stuff
9 we covered this summer, and I want to make sure that
10 I have a firm basis for what I've just said as far as
11 the statement against interests. Let me -- Mr.
12 Castellano, take again the Mr. Perez and Mr. Cordova
13 statements. I'm not concerned about a Bruton
14 problem, I'm not concerned about particularly a
15 Smalls or testimonial or Crawford issue, so I'm
16 putting those aside. But I'll come back and
17 reference them. But that's not my concern. But take
18 Mr. Perez, for example, his statements to Cordova.
19 I've said that the statements that are being made in
20 Mr. Perez' statements are -- come within the
21 co-conspirator exception with some statements we
22 identified this afternoon that we'll not be relying
23 on. But all the others I will rely on. But I want
24 to go back to Mr. Perez' statements. You and I, in
25 our discussions earlier -- and no defendant disputed

1 this -- we were relying upon the fact that Mr. Perez
2 was a party opponent. I think Smalls deals with the
3 Crawford-Bruton problem, so there is no
4 constitutional problems. But I'm looking for the
5 hearsay exception that gets the statements of Mr.
6 Perez on the tape to be used against other people.
7 And here's what I'm concerned about: "An opposing
8 party's statement, the statement is offered against
9 an opposing party and was made by that party," it
10 looks like the statement is only excluded from the
11 hearsay definition. So the definition part, when
12 it's used against the party that made the
13 statement -- so presumably, the United States will
14 want to use the Perez recording against Mr. Perez,
15 which I think is quite all right. But what do I do,
16 then, to find either it being a nonhearsay statement,
17 or a non -- or a hearsay exception to cover it being
18 used against other people? And again, I'm putting
19 aside the Bruton problem. Because I do think Smalls
20 solves it. And I'll give you my solution there.

21 If, in fact, the Tenth Circuit didn't have
22 a Bruton problem or Crawford problem or a testimonial
23 problem with an 803 exception for a nonavailable
24 witness, then it would seem to me that they would
25 have even less of a problem with something that is

1 classified as nonhearsay. But it is only nonhearsay
2 against Mr. Perez. It seems to me that something has
3 to be done to make it nonhearsay against others, or
4 is this a situation where we have to give a limiting
5 instruction? Again, it's not a Bruton problem or
6 Crawford problem or testimonial problem to say that
7 the jury cannot consider the statements of Mr. Perez
8 against any other party.

9 And if that's the case, it's not really my
10 problem. But it begins to be an evidentiary problem
11 for you, if I'm telling them that Mr. Perez'
12 statements, which is the first cut, can't be used
13 against anybody else, so they can only listen to it
14 in connection with Mr. Perez.

15 Thoughts on that? Have I analyzed the
16 hearsay problem correctly?

17 MR. CASTELLANO: I think possibly,
18 depending on where we end up with this, Your Honor --
19 I'm trying to look for examples here in the
20 transcript -- so, in other words, if Mr. Perez says
21 someone else told me something in this statement, we
22 want to figure out how that could be used against
23 that person or the other defendants?

24 THE COURT: No, I guess I'm thinking that
25 what -- and help me here -- but when the tape is

1 played about -- that Mr. Perez said to Mr. Cordova,
2 do I need to turn to the jury and say, "You cannot
3 consider this evidence against any other defendant,
4 because it's nonhearsay as to Mr. Perez," but I am
5 not thinking of a nonhearsay exception for Mr. Perez'
6 statement to be used against anyone else. And,
7 again, it's not a Bruton problem. They could be
8 tried together, everybody could be tried together,
9 which was where this first bubbled up, was in the
10 severance motions. But at least in instructing the
11 jury, how does the jury use anything that Mr. Perez
12 says against Mr. Baca?

13 MR. CASTELLANO: To be sure I'm
14 understanding you -- and I'll probably ask the
15 questions of my colleagues here in a second -- but
16 just to make sure I'm understanding the Court. In
17 other words, if it doesn't fall under Smalls, or it
18 doesn't fall under a co-conspirator statement, we
19 just have other statements throughout the transcript,
20 then how can we use those against the other
21 defendants in the courtroom; is that correct, if
22 they're not otherwise categorized by some other rule?

23 THE COURT: Well, let me put it in my
24 words. I'm not trying to avoid your question. But
25 let me put it in my words. Here's what 801 says --

1 it says: "Definitions." So statements that are not
2 hearsay, "An opposing party's statement, the
3 statement is offered against an opposing party, and,
4 A, was made by the party."

5 So you and I in our analysis, we were
6 putting Perez aside. We're saying, Okay, it's coming
7 in. It is coming in. But it's coming in against Mr.
8 Perez. How does his out-of-court statements being
9 offered for the truth of the matter come in against
10 any other defendant? Again, it's not a Bruton
11 problem, Crawford problem, testimonial. I think
12 Smalls takes care of that, which is the issue that we
13 were discussing at the severance. I think the
14 defendants had raised there were Bruton problems, and
15 I dealt with those. But then, how does Perez'
16 statements, how are they used against Mr. Baca or any
17 of the other four defendants?

18 MS. FOX-YOUNG: Your Honor --

19 THE COURT: Let them think a little bit. I
20 can probably guess what y'all are thinking. But let
21 me let them think just a second.

22 MS. FOX-YOUNG: I thought the Court might
23 want me to comment on the Bruton issue. Because I
24 don't think it is resolved. And I thought maybe
25 while they were talking, we could talk about it. But

1 I'll wait, Your Honor.

2 THE COURT: Let's do.

3 MR. CASTELLANO: The best shortest answer I
4 can give to the Court right now, in terms of whether
5 it comes in for the truth, would be -- still be under
6 a statement against interests because the statements
7 that Mr. Perez makes, even if he's repeating other
8 people's statements, or adopting those statements, is
9 still against his interests, because he's still
10 discussing the enterprise.

11 THE COURT: Okay. And this is where we
12 come back to what I was saying -- this is the
13 question I've tried to ask earlier, and then
14 abandoned it, and now I'm coming back to it. Because
15 you remember I started asking you: Do I need to fit
16 Mr. Perez' statement in to the statement against
17 interests? And I said, No, I don't because he's the
18 party opponent. So it fits there.

19 But I think I now need to come back to
20 that. If you're relying upon a statement against
21 interests -- this is what I was talking about -- do I
22 need to take into consideration his testimony? I
23 know it was offered in the suppression portion of the
24 hearings that we've had. But here's what 804(3)(a)
25 says, "A reasonable person in the declarant's

1 position would have made" -- it's "a statement that a
2 reasonable person in the declarant's position would
3 have made only if the person believed it to be true."

4 He has testified that everything he was
5 saying was a lie, or pretty much; not all of it, but
6 some of it. So -- and I guess the thing I'm pausing
7 on, it does seem to me that, even though I have said
8 I do not think his testimony was coherent or
9 credible, nonetheless, a reasonable person in Mr.
10 Perez' position could think that spreading lies about
11 himself was a good idea to protect himself from being
12 labeled as a snitch, and then suffering the fate of
13 something like Mr. Molina.

14 So I'm wondering is it going to fit that
15 exception, because either the Government's theory and
16 the defendant's theory, would they both be what a
17 reasonable person in Mr. Molina's shoes could have
18 done? And if so, then, it's only if the person
19 believed it to be true.

20 MR. CASTELLANO: Well, if we set aside Mr.
21 Perez' testimony for a second, if we look at the
22 statements themselves, there is actually not an
23 indication here that he's lying. In some places he's
24 defending his honor, and he's saying, basically,
25 Don't worry about it. I talked to "Pup." "Pup" said

1 I'm okay. Other people who questioned him about it,
2 he said he put him in check.

3 So I'm looking first at page 20536 of
4 DeLeon. And then, in 20535, there is a discussion
5 here in the middle of the page. He told somebody, "I
6 heard you're saying this and that, so I fucking
7 checked the trigger." So I'm not sure there is an
8 indication, from reading the transcript itself, that
9 Mr. Perez was lying about any of this. What he was
10 saying was --

11 THE COURT: I'm not saying the transcript
12 of his testimony in the suppression hearing.

13 MR. CASTELLANO: I mean, we have to do
14 something about this statement. I mean, if the Court
15 doesn't credit his testimony, the Court doesn't have
16 to credit the part where he says, I lied to Mr.
17 Cordova about all these things. And so I think
18 that's --

19 THE COURT: I agree with you that I don't
20 have to credit it. But I do have to make an
21 objective determination as to whether a reasonable
22 person in the declarant's position would have made
23 the statements that he made to Mr. Cordova only if
24 the person believed it to be true.

25 MR. CASTELLANO: Right. So looking at the

1 transcript, a reasonable person would not have
2 admitted to criminal liability unless it were true.
3 So, in the transcript, Mr. Perez admits that he gave
4 pieces of his walker to be served as shanks. He also
5 names the other people who were co-conspirators in
6 this case. And he's saying that to another person he
7 believes is an active SNM member. So it wouldn't
8 make sense for him to lie about other people who are
9 involved in the murder with him. A reasonable
10 person, under those circumstances, would not have
11 said that, would not have implicated other people in
12 the murder, if that weren't true. And that is all
13 against his interests.

14 THE COURT: Well, look at it. And help me
15 with the statement against interests. If that's
16 going to be the hearsay exception, if you're in
17 agreement with me -- if you're in agreement with me,
18 remember in Smalls, we only had one level of hearsay.
19 It was a jailhouse recording. So you're just -- you
20 know, you got Baca talking to Cordova, rather than
21 Perez talking to Cordova and talking about what Mr.
22 Baca said.

23 So you do have a little -- not a little,
24 it's an exception -- that's what's creating the whole
25 issue here. Smalls had only one level of hearsay, a

1 jailhouse recording of a declarant confession to a
2 confidential informant. So it's like Baca talking to
3 Cordova. And at least some of Mr. Perez' statements
4 have two levels of hearsay. And I guess the one
5 we're focusing on here: Mr. Baca told me X, Y, and
6 Z. And of course, Rule 805 is going to require me to
7 find an exception or an exclusion for each hearsay
8 level. We've been focusing on the second level, the
9 level within the recording. But I'm thinking that
10 that works as against Mr. Perez. But it may not work
11 against anyone else, which is not so much a problem
12 for me, but it's a problem for you.

13 MR. CASTELLANO: On page 20541, there is an
14 indication that Mr. Perez admits to membership in the
15 SNM. He says: Because once that happens, once
16 you're validated, you get done dirty all the way
17 around the board. In other words, things get pretty
18 rough for you once you're validated. You get locked
19 down and things of that nature.

20 THE COURT: Let's do this: I need to give
21 Ms. Bean another break. Take a look at -- if you're
22 going to rely on -- to get Mr. Perez' statements on
23 the tape against the other four defendants, see if
24 you can find anything, and we'll start looking at it,
25 too, as to what this statement in 804(3)(a) means:

1 "A reasonable person in the declarant's position
2 would have made a statement that a reasonable person
3 in the declarant's position would have made only if
4 the person believed it to be true." That's what I'm
5 pausing on. So if that's going to be the exception
6 you relied on -- and I'm not surprised; that was the
7 one that I was studying, and that was the portion
8 that I wondered if the Government had a way of
9 establishing that. So let's take a break for about
10 15 minutes, and then we'll come back in and resume
11 this argument.

12 I haven't forgotten your question, Ms.
13 Fox-Young, or your statement.

14 (The Court stood in recess.)

15 THE COURT: All right. We'll go back on
16 the record. I think every defendant has an attorney.
17 If you'll look around and make sure that your
18 co-defendant, each person has an attorney.

19 Let me do one thing ministerial before I
20 begin. I have sent Fed Ex packages back to
21 Albuquerque -- not today, but yesterday. They did
22 receive them. So again, just the status of vouchers
23 for the CJA lawyers, they had everything today that I
24 was able to get sent on Sunday, and then sent
25 yesterday. Then I got the package yesterday. They

1 received packages regularly. I think one day Fed Ex
2 had some delivery problems in the area. But they
3 have them all as of today. I did receive a Fed Ex
4 package today, and I'll be taking it back tonight.
5 And I have got some vouchers done. There was some
6 vouchers in there. So if you're wondering where
7 things stand, I did receive a packet today. It does
8 have some CJA vouchers. I have signed many of them.
9 I'll be taking them back. I don't know whether I'll
10 get the others done tonight or not. But that's where
11 we are. I did understand that Mr. Burke and Mr.
12 Castle didn't submit vouchers for today's hearing, so
13 you might talk to them about it. It seems to me that
14 that's probably something that can be remedied. They
15 can either just ask for it --

16 MR. COOPER: Or eat it.

17 THE COURT: I'm not suggesting eat it. But
18 wondering since like for today I signed Mr. Lowry's
19 stuff for this week, the vouchers. I don't know if
20 it has to be precise, if something comes up. You can
21 get those to us.

22 MR. COOPER: Thank you, Judge, for working
23 on our vouchers.

24 THE COURT: So tell Mr. Burke and Mr.
25 Castle to talk to Ms. Waters. I think that that can

1 be -- you know, if all of a sudden, you have an extra
2 day in Las Cruces, even if they didn't expect it, for
3 whatever reason, then talk to them about it. I think
4 it can be worked out so they can stay. I don't have
5 the answer off the top of my head. But tell them
6 that.

7 MS. HARBOUR-VALDEZ: We will, Your Honor.
8 Thank you.

9 THE COURT: All right. Mr. Castellano, we
10 were talking about 804(3)(a), and that was the
11 hearsay exception; you were using Mr. Perez'
12 statements to Mr. Cordova to find a hearsay
13 exception. Any further thoughts you have on that?

14 MR. CASTELLANO: I think I had three
15 thoughts over the break. And I don't think I had any
16 other thoughts after that. But so these are the
17 three thoughts. One is we talked about fear and
18 things of that nature. Mr. Perez testified he was
19 not intimidated in any way by Mr. Cordova. So I
20 think some of the fear factors that might come in
21 here in the statements, in terms of why he might be
22 worried, why he might lie. One, in the transcripts
23 themselves, he indicates no fear of anyone. And also
24 indicates that Mr. Baca told him that he was fine.
25 Then, in court, he told the Court he was not

1 intimidated in any way. So I think in terms of
2 having any type of motive to lie based on fear, it's
3 completely gone.

4 The second is that --

5 THE COURT: I know he didn't have any fear
6 about Mr. Cordova. But I thought what he testified
7 on the stand was he spread lies because he didn't
8 want to suffer the same fate as Mr. Molina himself.

9 MR. CASTELLANO: What he said was he wanted
10 to find a way to use Mr. Cordova as a conduit to,
11 once again, tell other people that there wasn't a
12 problem.

13 THE COURT: Correct. But he used lies, in
14 in his words, to do that. And I guess that's my
15 question, is that is a reasonable person in Mr.
16 Perez' position, could he have done that?

17 MR. CASTELLANO: Well, Your Honor, I only
18 had three thoughts on the break. That's a fourth
19 thought. And so Mr. Beck is actually going to handle
20 the reasonable person argument.

21 THE COURT: Okay.

22 MR. CASTELLANO: And I think you'll have an
23 answer for the Court here in a little bit.

24 THE COURT: Okay.

25 MR. CASTELLANO: Usually, when I walk up

1 here, I have a stack of papers, and refer to this as
2 one statement. But what we really need to think
3 about, this is multiple statements over multiple
4 days. So Exhibit 16 is one. And then we have 31A,
5 32A, 33A, all the way through 37A. Now, admittedly,
6 37A is not even one page of transcript.

7 But in terms of Mr. Perez' statement, it's
8 actually statements over days. And so, if we're
9 talking about him making these statements, he has had
10 time between recordings to think about these things.
11 But he's been fairly consistent throughout the
12 statements. So I think that also says something
13 about these statements. And 804, the statement
14 against interests, the second paragraph also talks
15 about sufficient corroboration in the statements.
16 And that's found, once again, throughout the
17 statements themselves. So we're not just talking
18 about one statement. We're talking about multiple
19 statements against interests.

20 And the last thought I had was that -- I
21 pointed out before the break, and Mr. Perez admitted
22 to being a member of the enterprise. So that itself
23 is against his own interests, because the enterprise
24 indeed is in racketeering activity. It would be hard
25 pressed to find a member of the enterprise who

1 couldn't be convicted of a racketeering conspiracy,
2 or having an agreement that somebody would commit
3 racketeering acts.

4 So, if you look at the statement
5 separately, that tells you something. If you look at
6 each one or all of them in a whole, it all talks
7 about the enterprise, membership in the enterprise,
8 and he's talking about family business. And those
9 things are all generally going to be against his
10 penal interests to be discussing. So I think all of
11 those would, therefore, weigh in favor of admitting
12 them as statements against interests.

13 And if you have any more questions, I think
14 Mr. Beck -- go ahead.

15 THE COURT: Yeah. I'm not hung -- I agree
16 with you on the -- once he admits to the SNM, that
17 he's a member of the SNM Gang, I think that probably
18 is enough to be against his interests. But the part
19 I'm hung up on is not that what he was saying was so
20 contrary to the declarant's interest, but that first
21 portion, because I have to give content to it, that
22 "a reasonable person in the declarant's position
23 would have made only if the person believed it to be
24 true." And so I guess I'm wondering, does that
25 require me to make a finding that he believed what he

1 was saying to be true, or does it simply require that
2 a reasonable person in the declarant's position would
3 have made it only if the person believed it to be
4 true, which suggests to me that it's an objective
5 standard, not a subjective one, that I bring to the
6 analysis.

7 And then, it seems to me -- I'm not trying
8 to make the argument for him -- but the argument
9 would be that a reasonable person in Mr. Perez'
10 position would have made these statements only if he
11 believed it was true. A reasonable person in his
12 position could have made those statements thinking
13 they were false, that he was purposely spreading a
14 lie.

15 So I guess that maybe I'm sort of beginning
16 to answer my own question, or at least phrase it
17 better. Can a person tell a lie that is a perfectly
18 reasonable lie, and if it's a perfectly reasonable
19 lie, can an opponent use that, use the 804(3)(a)
20 exception? Maybe that's the legal issue to decide.

21 MR. BECK: I think that's probably where he
22 was going to pass the baton to me, Your Honor.

23 THE COURT: Anything else, Mr. Castellano?

24 MR. CASTELLANO: No, Your Honor. I'll just
25 emphasize that these are multiple statements over

1 multiple days. So if he repeated those things over
2 multiple days, I think that tells us something as
3 well.

4 THE COURT: If it's a subjective standard.
5 If it's only an objective one, then I don't know.

6 MR. CASTELLANO: I think we're in better
7 shape if it's an objective standard, which I think it
8 will be. And if it's subjective -- the only time his
9 interest changed is when he came into court and then
10 told the Court that he lied. But he was in a
11 different position when he was testifying than he was
12 when he made the statements.

13 THE COURT: All right. Thank you, Mr.
14 Castellano.

15 Mr. Beck.

16 MR. BECK: I think what Mr. Castellano just
17 said is correct. If the Court looks to the Supreme
18 Court's decision in Williamson -- United States
19 against Williamson -- well, Williamson against the
20 United States, 512 U.S. 594, a 1994 Supreme Court
21 decision, a good explanation is provided in United
22 States against McVeigh, a district court opinion from
23 1996, which is found at 940 F.Supp.; starts on page
24 1541. It's an objective inquiry into what a
25 reasonable person in the declarant's position would

1 have been, with the qualification provided there.

2 And that's the language in the rule that
3 says "because, when made, it was so contrary to the
4 declarant's proprietary or pecuniary interests, or
5 had so great a tendency to invalidate declarants'
6 claim against someone else, or to expose the
7 declarant to civil or criminal liability." So the
8 inquiry here is whether it's against the declarant's
9 interests at the time the declarant made the
10 statement in the legal posture of the case.

11 And so, if you're looking at what would be
12 like a civil PI claim, that would be -- it would
13 invalidate the declarant's claim against someone.
14 Here, when we're talking about a defendant on trial
15 and giving a statement in prison, it would be against
16 the declarant's interests in that trial, on trial for
17 prison.

18 And if you look at the case law, it really
19 comes out of testimonial statements implicating
20 co-defendants. And you look very closely at the
21 statements to decide whether these testimonial
22 statements given usually post-Miranda in a briefing
23 room, are not against their interests because they
24 implicate other persons.

25 So here, in the context of an in-prison

1 conversation between two prisoners, the context of
2 this conversation in which Mr. Perez is implicating
3 himself, both as a member of the SNM, and as a
4 willing participant in the Molina murder, and
5 explaining how others willingly participated in the
6 Molina murder, in which he was a co-conspirator,
7 those statements come in as against his interests
8 because they implicate him with criminal liability in
9 a criminal proceeding.

10 THE COURT: Well, like I said to Mr.
11 Castellano, I'm not so concerned about whether the
12 statements he's making are contrary to his penal
13 interests. So I'm not needing that. What I am
14 concerned about is whether Mr. Perez -- I mean, just
15 listen to it. I mean, I can understand why a person
16 in prison would spread lies that are not in his penal
17 interests, why he would spread lies to keep from
18 being -- suffering the fate of Mr. Molina.

19 MR. BECK: Sure.

20 THE COURT: So if that's the case, if
21 you're looking at evidence that way --

22 MR. BECK: What I'm trying to say is that's
23 not the way we're looking at evidence under 803. If
24 it was, I think it would still be okay because of
25 testimony that's been given about what happens when

1 you tell false things about what you did in the SNM.

2 But, regardless, it's not. That's not the
3 inquiry. The inquiry is whether a reasonable person
4 in prison, involved in the Molina homicide, would
5 make these statements inculcating him in that Molina
6 homicide. And so that's the inquiry.

7 What his subjective intent was, or what
8 someone in his position, where he may be in trouble
9 from other people in the same -- that's not the
10 inquiry. So the inquiry here is whether a defendant
11 in prison, involved in a murder conspiracy, making
12 statements to other people in the prison would make
13 these inculpatory statements.

14 THE COURT: All right. Well, give it some
15 thought. I'm not quite convinced tonight that there
16 is a path by which this evidence should come in
17 against the other four. It's a new problem. It's
18 something that arose as we tried to figure out the
19 levels of hearsay under 805. I can't just analyze
20 one level. I have to look at all levels. So give it
21 some thought. And if you've got something you want
22 to put in writing to help me with it, you can.

23 I think we've dealt with the statements
24 within Mr. Perez' statements. But I think we need to
25 pull back and look at Perez' statements themselves

1 being used against others.

2 MR. BECK: I think those two cases -- and I
3 think reading the language closely in 804(3), and
4 looking at the qualifiers that start with that
5 "because" language, I think will help shed light on
6 the inquiry, and why these statements are admissible.

7 THE COURT: Okay. I'm leaving here with a
8 question mark. So y'all are going to have to help me
9 out. And it's not so much an evidentiary problem,
10 because it's going to come into the case. But I do
11 think that, right at the moment, I'm wondering why
12 I'm not turning to the jury and say, Ignore this
13 evidence against Mr. Baca in the other four.

14 All right. Let me -- before I hear from
15 you, Ms. Fox-Young, let me make some prefatory
16 comments. I think, before you came into the case --
17 when did you come in the case?

18 MS. FOX-YOUNG: I think in the late -- the
19 early winter, about a year ago.

20 THE COURT: I recall -- and someone will
21 have to refresh my memory -- maybe what I'm about to
22 say is of no use to me or anybody else. But I recall
23 up in Albuquerque, in the Rio Grande courtroom, that
24 we had an extensive conversation -- I think it was
25 with Mr. Castle. I think it was Mr. Castle that

1 really took on the Smalls problem. And he had to
2 admit that he didn't like it; none of the defendants
3 liked it, but it said what it said.

4 And so we did agree, just as we've sort of
5 done here, that there may be some residual Bruton
6 problems. At the time that I made the severance
7 decision -- that was where it was coming up, because
8 the defendants were making the argument that the
9 severance issues, that I should sever the case more
10 severely or more -- into more parts than I did
11 because of the Bruton problem. But at the time, the
12 defendants were only able to identify a certain
13 handful of statements.

14 So if you go back and read my large
15 severance opinion, what I attempted to do -- and I
16 hope I did, is that every statement that the
17 defendant -- I remember pushing myself every
18 statement that the defendant said was a Bruton
19 problem, I tried to do a Bruton analysis. And my
20 memory is that for most of the statements I said it's
21 not a problem, but I did identify like one, I think,
22 that still survived as a Bruton problem, and Smalls
23 didn't say that. So I guess, in my mind, even though
24 it was not really a Bruton motion, it was a severance
25 motion, I pushed myself hard. And the parties I

1 think did with what discovery they had at the time,
2 did feel like probably it was right; that -- I
3 remember Mr. Castle -- maybe it was Mr. Adams, I
4 don't know -- it was one of the counsel from out of
5 state that spent a lot of time -- we talked about it
6 and came up with the parameters here.

7 So I say that before I hear what you have
8 to say. But I'm still thinking that the Bruton
9 problems may be not the issue here, but just the
10 hearsay problems.

11 MS. FOX-YOUNG: Your Honor, I've read that
12 opinion, and I'm not going to take it up right now
13 and make a record on Bruton.

14 But I think Ms. Jacks wanted to respond
15 directly to the discussion that the Court has just
16 had with the Government with respect to Mr. Perez'
17 statements with Mr. Cordova.

18 I have some other issues I'd like to raise
19 both on the James statements, and then there is
20 another pleading that the Court took up. But not
21 today. I don't think we're going to --

22 THE COURT: I guess I'd like to hear what
23 you wanted to say, just so I can be thinking about
24 it. Go ahead and say what you want to say on the
25 Bruton issue, or what -- I think you said the Smalls

1 issue; maybe you said Bruton issue, but you didn't
2 think Smalls solved it. Go ahead and tell me what's
3 on your mind so I can be thinking about it.

4 MS. FOX-YOUNG: Well, your Honor, I've gone
5 back and looked at your opinion. And I think, when
6 we take up Document 1514, which was our motion in
7 limine on some specific statements of cooperating
8 witnesses that the Court raised it. And I said I
9 think we want to take this up at the end of the James
10 hearing. I would like to distinguish Smalls. But I
11 understand we have an issue with statements not being
12 found to be testimonial. And I don't need to make a
13 record on that now. I think the Court has labored on
14 this issue, and given us a lot of guidance. I know
15 what the Tenth Circuit law is.

16 But I don't want to detract from, I think,
17 the argument which may be brief, for the record, that
18 Ms. Jacks wanted to make.

19 THE COURT: Well, I'm not interested in
20 argument. I'm trying to think of issues that I need
21 to be thinking over the next few days. So tell me
22 what the Bruton and Smalls issues are, so I can be
23 thinking of them. This is for my benefit, not for
24 your benefit now.

25 MS. FOX-YOUNG: Your Honor, briefed in

1 Document 1514 are some objections that Mr. Perez has
2 to statements made -- and I can pull them up from the
3 transcript. But they're identified in that document.
4 There are statements made by -- that we believe
5 Timothy Martinez will testify to, that Defendant
6 Daniel Sanchez made, that Sanchez had obtained shanks
7 from Mr. Perez, and that Sanchez referred to him as
8 "Fat Ass," and said, "What else is 'Fat Ass' going to
9 do?"

10 There are also statements from Defendant
11 Jerry Montoya, who we expect to testify that Mario
12 Rodriguez provided him a shank to use to kill Molina.
13 And the testimony at the James hearing was that he,
14 in some way, volunteered that the shank came from
15 Mr. Perez --

16 THE COURT: Why don't you just, instead of
17 giving me a whole bunch of statements, take one
18 statement and tell me what the Bruton problem is, or
19 the Smalls problem you're concerned about.

20 MS. FOX-YOUNG: Well, I think those
21 statements should not come in as co-conspirator
22 statements, so I'd want to first address that. And
23 the reason is I don't think that -- where the --
24 first of all, I think there is a timing problem that
25 the Government has. The Government did not prove up,

1 in the course of the James hearing, when those
2 statements were made so far as I can tell. And so,
3 if defendants are making statements about where
4 shanks came from -- and that's well after the fact,
5 we think it is -- that's simply not in furtherance.

6 So, back to the Court's earlier inquiry and
7 request that the defense identify any statements that
8 we take issue with coming in as co-conspirator
9 statements, that would be my first argument. So,
10 specifically, in Document 1514, we lay out two. And
11 perhaps the Court could look at those. The
12 transcript is from November 27. And I think it's
13 page 164, where the Government says that Timothy
14 Martinez will testify that at some unknown time
15 Co-defendant Sanchez told him that Sanchez had
16 obtained shanks from Mr. Perez. I see no
17 reference -- I don't think the Government tied up the
18 timing on that. And I don't think it can be in
19 furtherance, if it's not clearly --

20 THE COURT: Okay. We'll come back and do
21 that. But tell me what -- you stood up over here and
22 you said, "I don't think that solves the Bruton
23 problem." I wanted to hear what you wanted to say at
24 that point.

25 MS. FOX-YOUNG: I have nothing else to say

1 with respect to any Bruton problem on Mr. Perez'
2 statements. I've looked back at the Court's ruling.
3 I understand how the Court thinks we get around that
4 with Smalls. And I think the Court's analysis on the
5 hearsay question is on point. So I don't have
6 anything else to say on that. But with respect to
7 these statements, I think we do get into a Smalls
8 issue, if the Court finds that they are
9 co-conspirator statements, because we have a question
10 as to whether they are against interests. And it's
11 the same analysis the Court's going through --

12 THE COURT: Well, it's not going to help
13 you out any, because if it's Mr. Perez' statements,
14 the example we've used, then, it can be used against
15 him just as a party opponent.

16 MS. FOX-YOUNG: Exactly. I'm talking about
17 Mr. Sanchez' statements. We have a series of other
18 statements where I think the Court needs to do a
19 Smalls analysis. But I don't want to interrupt where
20 the Court is with respect to Mr. Perez' statements.
21 I understand that it's not our fight as to whether
22 they come in against the other defendants.

23 And I think Ms. Jacks had something else to
24 say about that.

25 THE COURT: Sixty seconds, Ms. Jacks.

1 MS. JACKS: I do want to address this, just
2 because, when the Court previously considered the
3 arguments -- and I think they were really eloquently
4 made by Mr. Chambers this summer about the Smalls
5 issue. There was not any sort of evidence about what
6 type of statements, for example, Mr. Cordova -- what
7 the Government was going to offer through Billy
8 Cordova.

9 I just took another look at Smalls, and I
10 just want to make the distinction between the facts
11 of that case and this case.

12 THE COURT: I know. I've looked at them.
13 Let's do this: If y'all have something you want to
14 say, I told the Government they could comment on
15 this. The defendants are welcome to do it, too.
16 Let's shut down for the evening. I will see y'all on
17 January 8. And I appreciate everybody's hard work in
18 the month of December, this week.

19 MS. SIRIGNANO: Judge --

20 THE COURT: And everybody be safe and have
21 a good holiday. All right. Y'all have a good break.

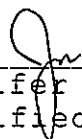
C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on December 28, 2017.



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